FILED
MAR 9 1925
WM. R. STANSBURY
CLERK

No. 583

Supreme Court of the United States

OCTOBER TERM, 1924

WALTER M. PIERCE, AS GOVERNOR OF THE STATE OF OREGON; ISAAC H. VAN WINKLE, AS ATTORNEY GENERAL OF THE STATE OF OREGON, AND STANLEY MYERS, AS DISTRICT ATTORNEY FOR MULTNOMAH COUNTY, STATE OF OREGON,

Appellants,

vs.

THE SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY,

Appellee.

BRIEF ON BEHALF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

J. P. KAVANAUGH,
JAY BOWERMAN,
DAN J. MALARKEY,
HALL S. LUSK,
E. B. SEABROOK,
F. J. LONERGAN,
Counsel for Appellee.

INDEX

Page

Preliminary Statement 1

Statement 2

Points:

I. Natural rights of liberty and property secured by the Constitution 10

II. Conducting schools is a useful occupation, secured and protected by the Fourteenth Amendment to the Constitution of the United States 15

III. The School Law deprives the appellee of its right to conduct its primary schools 25

IV. The School Law violates the right of parental control over children 33

V. The School Law cannot be sustained as a legitimate exercise of the police power 45

VI. Bases of action assigned by appellants are not tenable 53

(1) Juvenile crime 55

(2) Religious suspicion 56

(3) The "melting pot" 57

(4) Church and State 57

VII. The Act impairs the obligation of appellee's contract with the State, arising out of its charter 68

VIII. The Court has jurisdiction of the cause 83

(a) The appellee has capacity to bring this suit 83

(b) The suit is not premature 84

Conclusion 93

Appendix A 95

Appendix B 96

Table of Cases Cited

Page

Adams v. Tanner, 244 U. S. 590; 37 Sup. Ct. 662.....29, 46
Adkins v. Children's Hospital, 261 U. S. 525; 43 Sup. Ct. 394..... 23
Allgeyer v. State of Louisiana, 165 U. S. 578; 17 Sup. Ct. 427; 41 L. Ed. 832..... 13

Buchanan v. Warley, 245 U. S. 60; 38 Sup. Ct. 16.....23, 31, 34, 57, 84
Berea College v. Kentucky, 211 U. S. 45; 29 Sup. Ct. 33....19, 72, 78, 79
Butchers' Union Company v. Crescent City Company, 111 U. S. 746; 4 Sup. Ct. 652; 28 L. Ed. 585..... 11

California Reduction Co. vs. Sanitary Reduction Works, 126 Fed. 29..50
Carondelet Canal Co. v. State, 233 U. S. 362; 34 Sup. Ct. 627; 58 L. Ed. 1001..... 68
C. M. & St. P. Ry. Co. v. Wisconsin, 238 U. S. 491; 35 Sup. Ct. 869; 59 L. Ed.....24, 78, 79, 81
Columbia Trust Company v. Lincoln Institute, 138 Ky. 804; 129 S. W. 113..... 18
Commonwealth v. Armstrong, 1 Penn. Law Journal Reports, 146..39, 61
Connolly v. Union Sewer Pipe Co., 184 U. S. 540; 22 Sup. Ct. 431; 46 L. Ed. 679..... 48
Coppage v. Kansas, 236 U. S. 1; 35 Sup. Ct. 240; 59 L. Ed. 441..... 14
Covington etc. Co. v. Sandford, 164 U. S. 578; 17 Sup. Ct. 198..... 22

Dartmouth College v. Woodward, 4 Wheat. 518..... 68
Davenport v. Kleinschmidt, 6 Mont. 502..... 92
Denton v. James, 107 Kan. 729; 193 Pac. 307; 12 A. L. R. 1146..... 37
Detroit Creamery Co. v. Kinnane, 264 Fed. 845, 255 U. S. 102..... 92
Detroit v. Detroit Citizens Street Ry. Co., 184 U. S. 368; 22 Sup. Ct. 410; 46 L. Ed. 592..... 93
Dobbins v. Los Angeles, 195 U. S. 223; 25 Sup. Ct. 18; 49 L. Ed. 169. 47
Dodge v. Cole, 97 Ill. 338; 49 N. E. 523..... 90

Fairfield v. Gallatin County, 100 U. S. 359..... 78

Gulf, Colorado & Santa Fe Railway Co. v. Ellis, 165 U. S. 150; 17 Sup. Ct. 255; 41 L. Ed. 666..... 22

Hardwick v. Board of School Trustees (Cal.), 205 Pac. 49..... 38

Lawton v. Steel, 152 U. S. 133; 14 Sup. Ct. 499; 38 L. Ed. 169..... 46
Leverich v. Mayor etc. of Mobile, 110 Fed. 170..... 92
Liggett v. Ladd, 17 Or. 89; 21 Pac. 133.....65, 69, 72, 77, 78, 79
Lochner v. New York, 198 U. S. 45; 25 Sup. Ct. 539; 49 L. Ed. 937... 56
Lorntsen v. Union Fisherman's Co., 72 Or. 540; 143 Pac. 621 .....69, 72, 74, 77, 78, 79

Page

Louisville Gas Co. v. Citizens Co., 115 U. S. 683; 6 Sup. Ct. 265; 29 L. Ed. 510 69
Luther v. Borden, 7 How. (U. S.) 1; 12 L. Ed. 581 78
Mehlos v. Milwaukee, 156 Wis. 591; 146 N. W. 882 50
Meyer v. Nebraska, 262 U. S. 390; 43 Sup. Ct. 625; 67 L. Ed. 1042 ..... 13, 20, 24, 34, 42, 46, 57, 61, 63,
Morrow v. Wood, 35 Wis. 59 42
Mugler v. Kansas, 123 U. S. 623; 8 Sup. Ct. 273; 31 L. Ed. 205 29
Nashville C. & St. Ry. Co. v. McConnell, 82 Fed. 65 88
Nebraska District of Evangelical Lutheran Synod etc. v. McKelvie et al. (Neb.), 187 N. W. 927; 262 U. S. 404 ..... 24, 84
New York ex rel. Silz v. Hesterberg, 211 U. S. 31; 29 Sup. Ct. 10 49
Palatka Waterworks v. City of Palatka, 127 Fed. 164 91
Pennsylvania v. West Virginia, 262 U. S. 553; 43 Sup. Ct. 658 91
P. W. & B. R. R. Co. v. Bowers, 4th Houst. (Del.) 506 80
Reuben Quickbear v. Francis E. Leupp, 210 U. S. 77; 28 Sup. Ct. 690; 52 L. Ed. 954 66
Savage v. Jones, 225 U. S. 501; 32 Sup. Ct. 715; 56 L. Ed. 1181 84
School Board v. Thompson, 24 Okla. 1 36
School Trustees v. People, 87 Ill. 303 42
Smith Re, 143 Cal. 368 47
Smyth v. Ames, 169 U. S. 466; 18 Sup. Ct. 418; 42 L. Ed. 819 22
Society of Sisters of Holy Names etc. v. Pierce, 296 Fed. 928 ..... 22, 27, 53, 85
Southern Ry. Co. v. Greene, 216 U. S. 400; 30 Sup. Ct. 287; 54 L. Ed. 536 22
Spring Valley Co. v. San Francisco, 165 Fed. 667 23
State v. Richmond & Danville R. R. Co., 73 N. C. 527 79
Terrace v. Thompson, 263 U. S. 197; 44 Sup. Ct. 15 ... 23, 32, 34, 84, 87, 92
Toledo A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 746 88
Truax v. Raich, 239 U. S. 60; 36 Sup. Ct. 7; 60 L. Ed. 131 ..... 30, 34, 84
Union Fishermen's Co. v. Shoemaker, 98 Or. 659; 193 Pac. 476 49
Vicksburg Waterworks Co. v. City of Vicksburg, 185 U. S. 65; 22 Sup. Ct. 585; 46 L. Ed. 808 ..... 90, 91
Wade v. Travis, 174 U. S. 599; 19 Sup. Ct. 715; 43 L. Ed. 1060 77
Wadleigh v. Newhall, 136 Fed. 941 38
Watson v. Jones, 13 Wall. 679; 20 L. Ed. 666 65
Wilmington Co. v. Alsbrook, 146 U. S. 279; 13 Sup. Ct. 72; 36 L. Ed. 972 68
Willcox v. Consolidated Gas Co., 212 U. S. 19; 29 Sup. Ct. 192; 53 L. Ed. 382 92

No. 583

Supreme Court of the United States

OCTOBER TERM, 1924

WALTER M. PIERCE, AS GOVERNOR OF THE STATE OF OREGON; ISAAC H. VAN WINKLE, AS ATTORNEY GENERAL OF THE STATE OF OREGON, AND STANLEY MYERS, AS DISTRICT ATTORNEY FOR MULTNOMAH COUNTY, STATE OF OREGON,

Appellants,

vs.

THE SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY,

Appellee.

BRIEF ON BEHALF OF APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

This case comes before the Court on appeal from the District Court of the United States for the District of Oregon to review an order granting the appellee an interlocutory injunction against the enforcement, or threatened or attempted enforcement, of an initiative measure passed by the people of Oregon at the general election held November 7, 1922. The sole question involved is the constitutionality of that law.

Statement

The appellee is an educational corporation. It was incorporated under the laws of the State of Oregon, and by its charter it was granted the following authority and franchise:

> "The care of orphans, and the education and instruction of youth, and to establish and maintain academies or schools for the care and education of youth in the cities and towns of the State of Oregon."

In the exercise of this franchise the appellee for more than forty years has conducted and maintained private primary schools in the State of Oregon. It owns and conducts five schools of primary instruction which are attended by 765 children between the ages of eight and sixteen years. It owns buildings and equipment of large value which are devoted exclusively to these schools. Four of these are boarding schools in which many children who are orphans, or who have but one parent living, make their homes while receiving their education.

The appellee also conducts seven primary schools in buildings which it does not own, commonly called parochial schools, with a daily attendance of 1,115 children between the ages of eight and sixteen years. And it owns and conducts one orphanage in which 100 children within the same ages receive primary instruction.

In all of the schools the appellee teaches the same

subjects during the same hours and on the same days that those subjects are taught in the public schools of the state. In all things it conforms to the standards and methods of education prescribed by the laws of the State of Oregon. In addition to the subjects taught in the eight primary grades of the public schools, the appellee provides, as a part of the daily instruction, courses in religious instruction and moral training in accordance with the doctrines and moral teaching of the Roman Catholic Church. (Transcript, pp. 2-5.)

Before November 7, 1922, there was in force in the State of Oregon a compulsory education law, and on that day this law was amended by an initiative measure to compel all children in the primary grades between the ages of eight and sixteen years to attend the public schools of the State. The original law and the amendment are as follows:

ORIGINAL LAW

Sec. 5259. *Children Between the Ages of Nine and Fifteen Years*—Every parent, guardian or other person in the State of Oregon having control or charge of any child, or children between and including the ages of nine and fifteen years of age, shall be required to send such child or children to the public

AMENDMENT

Sec. 5259. *Children Between the Ages of Eight and Sixteen Years*—Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the dis-

schools for a term or period of not less or more than the number of months of public school held annually in the district in which such parent, guardian or other person in parental relation may reside; provided, that in the following cases, children shall not be required to attend public schools:

(a) *Children Being Taught in Private School* —Any child, or children, who is or are being taught for a like period of time in a private or parochial school such branches as are usually taught in the first eight years in the public schools, or has, or have, already acquired the ordinary branches of learning taught in such schools, the fact of which acquisition of such ordinary branches of learning by such child, or children, shall be determined by the school board in charge of the public school in such district;

trict in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense; provided, that in the following cases children shall not be required to attend public schools:

(a) *Children Physically Unable* — Any child who is abnormal, subnormal or physically unable to attend school.

(b) *Children Physically Unable*—Any child, or children, who is, or are physically unable to attend school. In such cases the truant officer shall require a written statement of a competent physician, certifying that such child, or children, is, or are physically unable to attend school;

(b) *Children Who Have Completed the Eighth Grade*—Any child who has completed the eighth grade, in accordance with the provisions of the state course of study.

(c) *Distance from School*—Children between the ages of nine and ten years of age whose parents live more than one and one-half miles, and children over ten years of age whose parents live more than three miles, by the nearest traveled road, from some public school; provided, that if transportation is furnished pupils in said district this exemption shall not apply.

(c) *Distance from School*—Children between the ages of eight and ten years, inclusive, whose place of residence is more than one and one-half miles and children over ten years of age whose place of residence is more than three miles, by the nearest traveled road, from a public school; provided, however, that if transportation to and from school is furnished by the school district, this exemption shall not apply.

(d) *Private Instruction*—Any child, or children, who is, or are, being taught for a like period of time by the parent or private teacher such subjects as are

(d) *Private Instruction*—Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the

usually taught in the first eight years in the public school, but before such child, or children, can be taught by a parent or private teacher, such parent or private teacher must receive written permission from the county superintendent, who is hereby authorized to grant such permission only in case of necessity, and such permission shall not extend longer than the end of the current school year. Such child, or children, must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If after such examination the county superintendent shall determine that such child, or children, is, or are, not being properly taught, then the county superintendent shall order the parent, guardian or other person in parental relation to send such child, or children, to school the remainder of the school year. Failure on the part of the parent, first eight years in the public school; but before such child can be taught by a parent or a private teacher, such parent or private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination, the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian or other person, to send such child to the public school the remainder of the school year. If any parent, guardian or other person having control or charge or custody of any child between the ages of eight and sixteen years shall fail to comply with any provision of this section, he shall be

guardian or other person in parental relation to comply with the order of the county superintendent shall render such person liable to the penalty provided for in this act.

Sec. 5260. *Penalty for Failure by Parent, etc., to Comply*—In case any parent or other person in parental relation shall fail to comply with the provisions of this act he shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be liable to a fine of not less than $5, nor more than $25, or by imprisonment in the county or city jail not less than two nor more than ten days, or by both such fine and imprisonment in the discretion of the court.

guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $5, nor more than $100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court.

This act shall take effect and be and remain in force from and after the first day of September, 1926.

The appellants threatened to enforce the provisions of the law and to arrest and prosecute all parents, guardians, and other persons *in loco parentis*, who would send children between the ages of eight and sixteen years to the appellee's primary schools after the date when the law would become operative. The operation of the law was by its terms suspended until September

1, 1926, but the existence of the law, and the threats of appellants to enforce it, were already causing the appellee irreparable damage and injury. Parents and guardians were withdrawing their children and wards from the appellee's schools. They were fearful that the appellee would be obliged to close its schools in the near future, and the uncertainty of the existence of these schools for any definite time induced the parents and guardians to withdraw such children from the private schools and place them in the public schools, which would be permanent, and where their children could pursue their courses from grade to grade without interference by the state or its enforcing officers. The result was a gradual and progressive withdrawal of patronage from the appellee's schools, due solely to the law, and to the threats to arrest and prosecute offending parents and guardians. Not only was the appellee's revenue thereby materially reduced, but its credit was so impaired that it was unable to secure funds for the purpose of erecting essential buildings and improvements. The existence of the appellee's schools was gravely imperilled, and it would be obliged to close its primary schools before the law became effective by its terms.

On December 22, 1923, the appellee filed its amended bill of complaint in the District Court of the United States for the District of Oregon, against the Governor and Attorney General of the State of Ore-

gon, and the District Attorney for Multnomah County, Oregon. In its amended bill the appellee sought to enjoin the enforcement of the amended act (which will hereafter be called the School Law), for that it violated certain provisions of the constitution of the United States and of the Constitution of the State of Oregon, particularly the due process clause of the Fourteenth Amendment and the contract clause of Section 10, Article I of the Constitution of the United States. (Transcript pp. 2-16). And thereafter on December 26, 1923, the appellee filed its motion for an interlocutory injunction in accordance with Section 266 of the Judicial Code of the United States, as amended. (Transcript p. 16).

On January 3, 1924, the appellants filed a motion to strike from the nineteenth paragraph of the amended bill of complaint certain averments on the ground that the same were redundant, irrelevant and not pertinent to the cause of suit. (Transcript p. 18). No other motion or pleading was filed by the appellants.

On January 15, 1924, a hearing was appointed for the appellee's application for interlocutory injunction before the Honorable William B. Gilbert, Circuit Judge of the Ninth Circuit, and the Honorable Charles E. Wolverton and the Honorable Robert S. Bean, District Judges for the District of Oregon. On March 31, 1924, the court, by Wolverton J., filed its opinion in which it declared the School Law to be unconstitutional

and void. (Transcript pp. 20-29). On the same day the court passed its order of interlocutory injunction enjoining the appellants from enforcing or attempting or threatening to enforce the School Law. (Transcript p. 19). This is an appeal from that order.

POINTS

I.

NATURAL RIGHTS OF LIBERTY AND PROPERTY SECURED BY THE CONSTITUTION.

In this country persons are endowed with certain natural rights. These rights were declared in the Declaration of 1776. They were not created by constitution or statute. They existed before constitutions were formed and they will exist after constitutions are dissolved. These rights are inherent and not derivative. The constitution assumes the existence of these natural rights, and it was designed to secure and protect the people against their invasion. First, by the Fifth Amendment, the people were secured against invasion by Congress, and later, by the Fourteenth Amendment, they were secured against invasion by the states. The rights of life, liberty and property, which the Fourteenth Amendment secures, are the same rights of life, liberty and the pursuit of happiness, which were declared inalienable by the Declaration of Independence.

Natural persons are secured in their right to life, liberty and property. Corporate persons are secured in their right of property. This right of property includes not only the right to acquire and own property, but also to use and enjoy property; to engage in and conduct any lawful business or calling, and to enjoy the patronage and income incident to such calling or business.

In *Butchers' Union Company vs. Crescent City Company,* 111 U. S. 746, 757, Mr. Justice Field said:

> "As in our intercourse with our fellow men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all governmental action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: 'We hold these truths to be self-evident (that is, so plain that their truth is recognized upon their mere statement), that all men are endowed' (not by edicts of emperors nor decrees of parliament nor acts of congress), but 'by their Creator, with certain inalienable rights,' (that is, rights which cannot be bartered away nor given away nor taken away except in punishment of crime), 'and that among these are life, liberty and the pursuit of happiness,' and to secure these (not grant them, but secure them), 'governments are instituted among men, deriving their just powers from the consent of the governed.'
>
> "Among these inalienable rights, as proclaimed in that great document, is the right of

men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity, or develop their faculties, so as to give them their highest enjoyment.

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."

In the same case, in a concurring opinion, Mr. Justice Bradley said (p. 762):

"The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the express words of the constitution."

In *Allgeyer vs. State of Louisiana,* 165 U. S. 578, 589, it is said:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In *Meyer vs. Nebraska,* 262 U. S. 390, 399, Mr. Justice McReynolds said:

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without

> reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final nor conclusive, but is subject to supervision by the courts."

The right of property is as sacred as the right to liberty. The protections of the Fourteenth Amendment are equal.

In *Coppage vs. Kansas,* 236 U. S. 1, 17, it is said:

> "But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of life, liberty or property without due process of law' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars states from any unwarranted interference with either."

These rights of liberty and property are not absolute. The maxim that one must so use his own as not to injure another is of general application. These rights are subject to reasonable restraint and regulation in the interest of the public health, morals, safety and welfare. This is a condition on which rights of person and property are held. But one engaged in a lawful business is entitled to enjoy his property rights free from unreasonable restraint or regulation. This is liberty regulated by law.

The police power reserved to the states is broad and undefined, but there is a limit to its valid exercise. If this were not so the Fourteenth Amendment would

have no efficacy and the states would have unlimited power.

II.

Conducting Schools is a Useful Occupation, Secured and Protected by the Fourteenth Amendment to the Constitution of the United States.

The teaching profession is essentially a useful occupation. Education is a great estate, and it is one of the most vital interests of the nation. It has become one of our greatest tasks. The financial burden is increasing, but is a burden we cheerfully bear. Educational values are not confined to mental instruction. It is vitally important that the light of knowledge may break into the immature mind, but it is even more important that during the formative period of youth there be implanted the true principles and qualities of character. And the school leaves its impress on the character of its pupils.

Every worthy institution of learning is performing a real service to America. And this service does not depend upon the source of its revenue or support, or whether it be a public or private school. There is no system of education which has reached the point of settled perfection in the instruction of the young. There is no system of mental training that approaches perfection so nearly that it can wisely be imposed as the *sine*

qua non for all the children of the country. There is obvious danger in inflexible standards of education. The teaching art is essentially progressive, and our present standards, in the light of experience, may be later discarded. The more agencies that are engaged in this enterprise, the more separated interests we have devoting their earnest efforts to the common purpose, the greater will be the excellence of our institutions of learning. In this, as in other great enterprises, the spirit of competition is a wholesome and constant urge to continued improvement. It is not from uniformity but from variation that progress is born.

The private school has a venerable history. It has contributed to the wide diffusion of knowledge, to the spread of morality and religion, to the development of character, and to the progress of the world. In this country it antedates the public school. Before the foundations of our country were laid it was engaged in imparting knowledge to the men who later breathed into this nation the breath of life. From that day to our own time it has continued without interruption the worthy work of instructing youth. From small and humble beginnings many of these institutions have grown until they have become the greatest educational foundations in the land.

The state of Oregon, early in its history, recognized the value of private schools, and invited and encouraged them to establish institutions there. It enacted laws

which enabled individuals to organize into corporations for the purpose of carrying on the work of education. It was under these laws that the appellee and many other educational corporations were created.

The most eminent educators of this country testify to the value of the private school to the cause of education, and even to the public schools. From the utterances of many men who are entitled to speak with authority, we quote the following:

> "I believe in our dual system of education. I think that it strengthens our tax supported schools and that it produces valuable results because of wide educational experimentation."
>
> *M. Leroy Burton, President University of Michigan.*

> "I believe in the public school system. It has been the salvation of our democracy, but the private schools and colleges have been the salvation of our public schools. These private institutions have their place in our educational system; they prevent it from becoming autocratic and arbitrary and encourage its growth along new lines."
>
> *Philander Claxton, former U. S. Commissioner of Education.*

> "The prohibition of the private elementary school means that private enterprise is not to be allowed to do that extremely valuable experimentation that public agencies rarely find it possible or advisable to attempt."
>
> *Frank Aydelotte, President Swarthmore College.*

> "The interests of public schools require free competition, free experiment and free criticism."
>
> *Edward T. Devine, Associate Editor of The Survey.*

The National Educational Association of the United States, which is the national organization of the public school teachers, adopted the following resolution at the annual convention held in Washington, D. C., on July 3, 1924:

> "The National Educational Association, while recognizing the American public school as a great nursery of broad and tolerant citizenship and of a democratic brotherhood, acknowledges also the contribution made to education by private institutions and enterprises, and recognizes that *citizens have the right to educate their children in either public or private schools,* when the educational standards of both are approved by the State educational authorities."

The courts of the country, on more than one occasion, have given their sanction to the right of persons to engage in this useful occupation.

In *Columbia Trust Company vs. Lincoln Institute,* 138 Ky. 104, it is said:

> "It is useless to multiply authorities on so obvious a proposition. If the teaching of the young to be useful, upright, Christian citizens is not inimical to the public safety, public morals, or the public health, then it must follow that an act which seeks either to prohibit it altogether, or to authorize others to prohibit it, must be in-

valid. It is difficult to find language to make plainer that which is so obvious as is the proposition before us. The purposes of the institutions under discussion include the whole circle of the solid virtues with which youth may be endowed. Undoubtedly, it is a substantial good to educate the youth of the state; and such is the declared policy of the constitution. . . . And when academic education is supplemented by religious training and special instruction in the agricultural and mechanical arts and sciences, it seems to us that it is contrary to the most obvious public policy that an institution which affords such an education should be in any way blocked or impeded. What good reason can be given for prohibiting the exercise of such a charity as that which we have under discussion, unless it can be shown that education, supplemented by religious training, may be in some way an evil to society? Does not the mind of every virtuous and right thinking person at once admit that the contrary is true? Do we not know that religious educational training has a tendency to make men more industrious, more virtuous and better generally, morally and physically? In other words, better, wiser and more useful citizens."

In *Berea College vs. Kentucky,* 211 U. S. 45, 67, Mr. Justice Harlan, in a dissenting opinion, but on a point on which there was no apparent conflict, said:

"The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden nor interfered with by government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right

> to impart instruction, harmless in itself, beneficial to those who receive it, is a substantial right of property—especially where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the constitution of the United States. This court has more than once said that liberty guaranteed by the 14th amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways'."

Finally, in the recent decision in *Meyer vs. Nebraska*, 262 U. S. 390, 400, it is said:

> "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.
>
> "Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as help-

ful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

"The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act.' *Nebraska District of Evangelical Lutheran Synod, etc., vs. McKelvie et al.* (Neb.) 187 N. W. 927 (April 19, 1922). Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian and every other alien speech are within the ban. Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."

The decisions which we have cited, culminating in the notable opinion in *Meyer vs. Nebraska, supra,* remove from the field of controversy, if it was ever debatable, the doctrine that people in this country have certain natural rights; that among these is the right to follow useful occupations; that the calling of a teacher is a useful occupation, and that teachers are protected by the Fourteenth Amendment against arbitrary and unreasonable invasion of their calling by the state.

Corporations have no liberty within the meaning of the Fourteenth Amendment, but they are protected in their property rights by the sanctions of that Amendment. *Smyth vs. Ames,* 169 U. S. 466; *Covington etc. Co. vs. Sandford,* 164 U. S. 578; *Gulf, Colorado & Santa Fe Railway Co. vs. Ellis,* 165 U. S. 150, 154; *Southern Ry. Co. vs. Greene,* 216 U. S. 400, 416.

The lower court, after quoting from *Meyer vs. Nebraska, supra,* the statement that Meyer's right thus to teach and the right of parents to engage him so to instruct their children, are within the liberty of the Amendment, said:

> "These declarations, although they speak of the individual, are applicable here, notwithstanding complainants are bodies corporate. Their right and privilege to teach the grammar school grades and the privilege of parents to employ them, are the same as though the individual were conducting a private school along the same lines. The mere fact that they bear corporate names affords no basis for distinguishing them from private schools, conducted by an individual or individuals with a corps of instructors, and teachers, to carry on the school work." *Society of Sisters of Holy Names, etc., vs. Pierce,* 296 Fed. 928, 937. (Transcript, p. 20.)

It was also said in the opinion:

> "It can scarcely be contended that complainants' right to carry on their schools, whether parochial or private, is not a property right." (Transcript, p. 24.) 296 Fed. 928, 933.

In *Spring Valley Co. vs. San Francisco*, 165 Fed. 667, 676, it is said:

> "The terms 'life, liberty and property' embrace every right which the law protects; they include not only the right to own and hold, but also the right to use and enjoy property. Profits and income are property."

In *Terrace vs. Thompson*, 263 U. S. 197, 215, the court said:

> "The Terraces' property rights in the land include the right to use, lease and dispose of it for lawful purposes, and the Constitution protects these essential attributes of property.

In *Buchanan vs. Warley*, 245 U. S. 60, 74, it is said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."

In 12 C. J. 1212, Sec. 988, it is said:

> "The term 'property' as used in the various guaranties against the taking of property without due process of law, is used in its most general sense as embracing everything over which man may have exclusive dominion."

In *Adkins vs. Childrens Hospital*, 261 U. S. 525, a corporation's right to contract with its employees was

held to be a property right, and in *C. M. & St. P. Ry. Co. vs. Wisconsin*, 238 U. S. 491, the right of a railroad corporation to lower the upper berths in sleeping cars when not occupied, was held to be a property right.

There ought to be no difficulty in sustaining as a property right, the right of a teacher to contract for his services. But whether it be a right of liberty or of property, or partakes of the nature of both, there can be no doubt that an educational corporation is protected in its right to conduct a school by the guaranties of the Fourteenth Amendment, in view of the decision in the case of *Nebraska District of Evangelical Lutheran Synod v. McKelvie et al*, 262 U. S. 404, rendered at the same time as the decision in *Meyer vs. Nebraska, supra.* This Synod case was a suit to enjoin the officers of the State of Nebraska from enforcing as against it the provisions of the Nebraska language act. The Supreme Court of Nebraska denied the injunction, but its decree was reversed by the Supreme Court of the United States. The bill of complaint, as appears from the transcript of record, pp. 7, 8, alleges that the State officials were threatening to enforce the act by arresting and prosecuting the Synod's pastors, officers and agents and teachers, and that in this way the Synod and the pastors, officers, agents and teachers would be deprived of their property and liberty without due process of law. The court rendered a memorandum opinion on the authority of *Meyer vs. Nebraska*, but, as the relief sought

was granted, it follows, that the court held that the Synod's right to conduct its school, free from unlawful interference, is a property right. And it was held to be a right protected by the Fourteenth Amendment.

III.

The School Law Deprives the Appellee of Its Right to Conduct Its Primary Schools.

The purpose of the law was to abolish all private primary schools in Oregon, and that would be its inevitable effect.

In Oregon a child under six years of age cannot attend school. The normal rate of progress for children is one grade each year. There are eight primary grades, and a normal child should complete the eighth grade at the age of thirteen or fourteen years. At eight years of age the child should be in the third grade, and there are few children who remain in any of the first eight grades to the age of sixteen years. In private schools there will naturally be so few children of eight years of age who have not completed the second grade, and so few of the age of sixteen years, or over, who have not completed all of the primary grades, that it would be impracticable to maintain any grade beyond the second if this law were enforced. The inevitable result would be to remove six grades, from the third to

the eighth, inclusive, from all primary private schools. It does not require argument to convince one that this would close the primary schools. These schools are organized, equipped and appointed with the view of instructing in all of the primary grades. To remove two-third of all the grades would not only impair and reduce the patronage, but it would disorganize the entire system. Moreover, the attendance in the two first grades would be materially reduced, because few parents would be inclined to send their children to a school where only two grades are taught. Such children would be required to change to another school when they had completed the second grade.

The law was proposed ostensibly to enforce compulsory education. It bore that title on the official ballot. This ballot title was misleading. Compulsory education was amply provided by the law it is intended to amend, and compulsory education is not advanced in the slightest degree by this measure. A comparison of the two statutes appearing in the Statement will disclose that it was neither the purpose nor the intention of the proponents to extend compulsory education. The single purpose was to enforce *compulsory public school attendance*, and by that means to force all primary private schools to close.

A school cannot be maintained without pupils. Neither can it remain static. It must either progress or it will decline.

The District Court in its decision said:

> "The act could not be more effective for utterly destroying the business and occupation of complainants' schools, except perhaps the college and higher preparatory grades, if it had been entitled 'An Act to prevent parochial and private schools from teaching the grammar grades.' This serves to emphasize the seriousness of the controversy. Indeed, the simile is no stronger than the argument for the adoption of the measure put it: 'A divided school can no more succeed than a divided nation.' That such is the purpose of the act is obvious and incontrovertible." 296 F. 936. (Transcript, p. 27.)

And again:

> "It is at once obvious that, in the very nature of the upbuilding and maintenance of parochial and private schools, when the attendance, prospective as well as acquired, is taken away or rendered unlawful, it will destroy the pursuit or occupation. If school buildings have been constructed, and equipment purchased and provided, without school attendance, such property must lapse into disuse, and become of no value for the purposes for which it was designed, and, of course, an irreparable loss will ensue; the paramount loss of school attendance, and a damage and practical destruction, especially for school purposes, of the school property." 296 F. 933. (Transcript, p. 24.)

The reference of the District Court to the "divided school" is from the argument of the proponents in the

official pamphlet advocating the adoption of the measure. (Appendix B).

The School Law does not mention private schools and its penal provisions are directed to parents and others who fail to send their children to the public schools. The private schools cannot be maintained in their normal courses unless they can induce their patrons to violate the law and incur the penalties of fine and imprisonment. This creates an impossible condition. It is common knowledge that private schools are maintained on narrow margins of profit, and that they require constant encouragement and continued support for their existence. A penal statute directed against their patrons would at once make their maintenance impossible.

It is suggested that private schools may still be maintained for "supplementary instruction," for students over or under the age limits set by the law, or before or after the sessions of the public schools. We will only pause to cite the frank admission in the Attorney General's brief, that the people of Oregon "have enacted a law requiring that all children shall be educated *exclusively* in the public schools." (p. 72).

It is the practice and it is the duty of courts to look through forms into the substance of things. They will not be deceived by pretense, however artful, to enforce prohibition in the guise of regulation.

In *Mugler v. Kansas,* 123 U. S. 623, 661, Mr. Justice Harlan said:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislative has transcended the limits of its authority."

In *Adams vs. Tanner,* 244 U. S. 590, 593, Mr. Justive McReynolds said:

> "Appellant's occupation as agent for workers cannot exist unless they pay for what they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation. 'You take my house, when you do take the prop that doth sustain my house; you take my life when you do take the means whereby I live.' "

This law was aimed at the destruction of the private schools by requiring parents and guardians to send their children to the public schools. The arrest and prosecution of offending parents and guardians would directly affect the persons named in the statute. It would invade the natural right of the parent to direct the education of his own. It would deprive the teachers in the private schools of the right to earn their living in a lawful calling. It would deprive children of their right to acquire useful knowledge in a private

school. And, finally, it would deprive private schools of their property right in the patronage of the schools, and of their right to engage in a lawful and useful occupation.

In *Truax vs. Raich,* 239 U. S. 60, the court was considering an initiative law of Arizona. The law prohibited employers of labor, having more than five workers, from employing less than eighty per cent qualified electors or native-born citizens of the United States. Mike Raich, an alien, in the employ of Truax, brought suit to enjoin the enforcement of the law. It was there contended that "the complainant cannot sue save to redress his own grievance; that is, that the servant cannot complaint for the master, and that it is the master who is subject to prosecution, and not the complainant." The court, regarding the "internal sense" and "substance" of the law, said, p. 38:

> "The fact that the employment is at the will of the parties does not make it at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of a third person is actionable, although the employment is at will.
>
> "But the act undertakes to operate directly upon the employment of aliens, and if enforced would compel the employers to discharge a sufficient number of his employees to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant

will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions. It is therefore idle to call the injury indirect or remote."

In *Buchanan vs. Warley*, 245 U. S. 60, 74, Mr. Justice Day said:

"The objection is made that this writ of error should be dismissed because the alleged denial of constitutional rights involves only the rights of colored persons, and the plaintiff in error is a white person. This court has frequently held that while an unconstitutional act is no law, attacks upon the validity of laws can only be entertained when made by those whose rights are directly affected by the law or ordinance in question. Only such persons, it has been settled, can be heard to attack the constitutionality of the law or ordinance. But this case does not run counter to that principle.

"The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to

> acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack upon the alleged violation of another's rights. In this case the property rights of the plaintiff are necessarily involved."

The court then determined that the statute in quesiton was unconstitutional because it prevented alienation of property to a negro solely on account of his color.

In *Terrace vs. Thompson, supra,* the validity of the Alien Land Act of Washington was involved. Nakatsuka desired to lease the land of the Terraces. The Terraces and Nakatsuka joined in a suit to restrain the Attorney General from enforcing the Act. Mr. Justice Butler said (263 U. S. 215):

> "The Terraces' property rights in the land include the right to use, lease and dispose of it for lawful purposes, and the Constitution protects these essential attributes of property, and also protects Nakatsuka in his right to earn a living by following the ordinary occupations of life. If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease the land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer. * * * *The owners have an interest in the freedom of the alien, and he has an interest in their freedom to*

make the lease. The state act purports to act directly upon the consummation of the proposed transaction between them, and the threat and purpose of the Attorney General to enforce its punishments and forfeitures prevents each from dealing with the other."

So the appellee here has an interest in the freedom of the parent to contract with it for the education of the child. The liberty of the parent cannot be invaded without a direct invasion of the appellee's property rights.

IV.

The School Law Violates the Right of Parental Control over Children.

Although no parent is a party to this proceeding, it is our position that the right of the parent to control the education of his own is so intimately connected with the right of the appellee to maintain its primary schools, that the question of parental rights is here directly involved. This is because the appellee's business of conducting primary schools is dependent for its continued existence on its ability to make contracts with parents. If the parents have a constitutional right to enter into such contracts, then the enforcement of the School Law will directly affect the rights of the appellee by an unwarranted invasion of the parental right. The unlawful

coercion of the parents who patronize the private schools, is a matter of vital interest to the appellee.

Meyer v. Nebraska, supra, is directly in point. The act there laid its prohibition upon the teacher. It was the teacher against whom the penalty for violation of the act was directed. It was a teacher who was prosecuted in the particular case. Yet, the court did not confine its decision to the teacher's right to teach German; it also determined the question of the parents' right to engage the services of the teacher, saying:

> "His (Meyer's) right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment," and
>
> "Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."

In *Terrace vs. Thompson, supra,* the court determined the rights of both the owner of the land and the alien; in *Truax vs. Raich, supra,* the court determined the rights of both the master and the servant; in *Buchanan vs. Warley, supra,* the court determined the rights both of the vendor of the land and the colored man to whom he had agreed to sell.

The appellee being threatened with the consequences of the enforcement of an act which assumes to prevent it from dealing with parents who desire to enter into

contracts with it for the education of their children, it becomes appropriate to determine what are the parents' rights in those circumstances. Indeed, the determination of that question seems to be necessary, because if the state has the right to prevent parents from sending their children to private schools, then the interference with appellee is not unlawful.

It is our view, based upon the facts of nature and the character of our institutions, that the parent has a natural right to the custody and control of his children, and that included therein is the right to direct and control their education. The State, as *parens patriae*, may interfere to the extent necessary to compel the parent to perform the duties arising out of his relation to the child, and for that reason compulsory education laws, such as are in effect in Oregon, and in most of the States of the Union, are a valid exercise of the state's power. For the same reason, laws may be enacted and enforced through the operation of which the court may interfere with the parent's ordinary right of custody where it appears, after a judicial hearing, upon a sufficient showing, that parental authority is not being properly exercised.

But this parental right of custody and control is not a privilege granted by the state to the parent which the state may at will withdraw. The notion that the state at any time it desires may invade the home and wrest the child from the guidance and care of the mother and

father, is entirely foreign to American institutions. American ideals are not founded on a Spartan model. The people were not made for the glory and aggrandizement of the government, but our government was instituted to promote the liberty and happiness of the people. In the Constitution of Oregon, Art. I, Sec. 1, is this declaration:

> "We declare that all men, when they form a social compact, are equal in right; that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; and they have at all times a right to alter, reform or abolish the government in such manner as they may think proper."

The family, with the parents' authority over and duty to care for the children, and with the childrens' reciprocal duty of obedience, existed before governments began and perhaps will outlive them. Free government is built around the family, and it cannot long endure if the sanctity of the home be not preserved, and parental authority is essential to the sanctity of the home.

"There are certain virtues," says the Supreme Court of Oklahoma in the case of *School Board v. Thompson*, 24 Okla. 1, 10, "that may safely be attributed to the generality of mankind, among which are love of country and love of offspring." It is the parent's love for his offspring that makes him the rightful mentor of the

child. Compulsory education laws are made for the exceptional parent who refuses to perform his duty in that respect.

In *Denton v. James*, 107 Kan. 729, 193 Pac. 307, 12 A. L. R. 1146, 1151, it is said:

> "Sometimes it is declared that the rearing of children is a function which the state delegates to parents, and which it may resume at will, for its welfare through welfare of the child. The rearing of children is not in fact a function delegated by the state to the citizen, any more than the begetting of children is a delegated state function, and the theory of government recognized by the declaration is responsible for absolutism in its most tyrannical form. The theory is expressly repudiated by the first two sections of the Bill of Rights of this state:
>
> "1. All men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness.
>
> "2. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit." Gen. Stat. 1915, pars. 105. 106.
>
> "Man has no higher right or interest or happiness than that for which the words 'family' and 'home' stand. Very often it is said, with a touch of derision, that a child is not a chattel, and a parent has no property in his child giving him right to custody, which is very true. The interest which a parent has in the nurture of his own offspring, and in nearness to them for that purpose, lies in a different plane from that occupied by property. It transcends property. On the

> child's side, it has no higher welfare than to be reared by its parents. The state has no higher welfare than to have children reared by their parents, and free government is instituted for the protection and benefit of parenthood as one of the natural rights which the citizen possesses."

In *Wadleigh v. Newhall,* 136 Fed. 941, 947, the court quotes from 2 Story Eq. Jur. Sec. 1341, as follows:

> "The jurisdiction of the court of chancery extends to the care of the person of the infant so far as necessary for his protection and education. * * * It is upon the former ground principally—that is to say, for the due protection and education of the infant—that the court interferes with the ordinary rights of parents, as guardians by nature or by nurture, in regard to the custody or care of their children. For although, in general parents are intrusted with the custody and care of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of and will be brought up with a due education in literature, and morals, and religion, and that they will be treated with kindness and affection."

In *Hardwick v. Board of School Trustees,* 205 Pac. 49 (Cal.), the court held that a school board could not, as against the will of a parent, compel a pupil in a public school to take part in certain forms of dancing as part of the curriculum. On the subject of the authority of the parent, the court said (p. 54):

"Has the state the right to enact a law or confer upon any public authorities a power the effect of which would be to alienate in a measure the children from parental authority? May the parents thus be eliminated in any measure from consideration in the matter of the discipline and education of their children along lines looking to the building up of the personal character and the advancement of the personal welfare of the latter? These questions, of course, proceed upon the assumption that the views of parents affecting the education and discipline of their children are reasonable, relate to matters in the rearing and education of their children as to which their voice and choice should first be heeded and not offensive to the moral well-being of the children or inconsistent with the best interests of society; and to answer said questions in the affirmative would be to give sanction to a power over home life that might result in denying to parents their natural as well as their constitutional right to govern or control, within the scope of just parental authority, their own progeny. Indeed, it would be distinctly revolutionary and possibly subversive of that home life so essential to the safety and security of society and the government which regulates it, the very opposite effect of what the public school system is designed to accomplish, to hold that any such overreaching power existed in the state or any of its agencies."

The case of *Commonwealth v. Armstrong*, 1 Penn. Law Journal Reports, 146, is a decision of the Supreme Court of Pennsylvania in the Court of Quarter Sessions of the Peace for Lycoming County. The opinion by Justice Lewis is a clear exposition of the nature and ex-

tent of parental authority. It attracted the attention of Chancellor Kent who in a letter to Judge Lewis, printed at page 154 of the Reports, said that he agreed with the "reasoning and conclusion", and added, "I have noted in a blank leaf in a proper place in my commentaries, the decision as a just explanation and application of the parental authority to a case like the one before you". The case arose on an application of a minister of the Baptist faith for an order of the court requiring the defendant to give surety for keeping the peace. Against the positive commands of the defendant, the minister had baptized the daughter of the defendant by immersion, and the parent had threatened the minister with personal injury. The court, holding that no man has the right to take the law into his own hands, ordered the defendant to give surety to keep the peace, but in determining the question of who should pay the costs inquired into the conduct of the parties to ascertain whose wrongful act produced the necessity for the application. It was held that the minister had interfered with the lawful authority of the father over his own offspring, and that he therefore should pay the costs.

The opinion, a long one, may be read with profit in its entirety. We can reproduce only a portion of it here. It was said:

> "The authority of the father results from his duties. He is charged with the duties of main-

tenance and education. These cannot be performed without the authority to command and to enforce obedience. The term education is not limited to the ordinary instruction of the child in the pursuits of literature. It comprehends a proper attention to the moral and religious sentiments of the child. In the discharge of this duty, it is the undoubted right of the father to designate such teachers, either in morals, religion or literature, as he shall deem best calculated to give correct instruction to the child. No teacher, either in religion or in any other branch of education, has any authority over the child, except what he derives from its parent or guardian; and that authority may be withdrawn whenever the parent, in the exercise of his discretionary power, may think proper. * * *

"The patriarchal government was established by the Most High, and, with the necessary modifications, it exists at the present day. The authority of the parent over the youth and inexperience of his offspring, rests on foundations far more sacred than the institutions of man."

After quoting from the Scriptures and the writings of scholars in support of the foregoing statements, the Court continued:

"The doctrines of the common law are in accordance with these principles. It is the duty of the parent to maintain and educate the child, and he possesses the resulting authority to control it in all things necessary to the accomplishment of these objects. The law has assigned no limits to the authority of the parent over the child, except that it must not be exercised in such manner as to endanger its safety or morals. If the parent

> should transcend his authority in this respect, an appeal does not lie to a minister of the Gospel of any denomination whatever. Application for relief can only be made to the authorities entrusted by the supremacy of the law, with the high power of controlling parental authority when the morals or safety of the child require such interference. 1 Blackstone, 450; 2 Kent's Commentaries, 205.
>
> "It is dangerous to depart from established principles. Parental authority is not to be subverted so long as it is exercised within the limits which the law has prescribed. It is the duty of the parent to regulate the conscience of the child, by proper attention to its education; and there is no security for the offspring during the tender years of its minority but in obedience to the authority of its parents in all things not injurious to its health or morals."

The fact that courts of authority have sustained the right of parents to select studies for their children even in public schools, indicates how firmly the doctrine of parental authority is implanted in our law. *School Trustees v. People,* 87 Ill. 303; *School Board v. Thompson,* 24 Okla. 1; *Morrow v. Wood,* 35 Wis. 59.

Meyer v. Nebraska, supra, reaffirms that doctrine. Mr. Justice McReynolds said:

> "Corresponding to the right of control it is the natural duty of the parent to give his children education suitable to their station in life, and nearly all the states, including Nebraska, enforce this obligation by compulsory laws. * * *
>
> "Evidently the Legislature has attempted materially to interfere with the calling of modern

language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."

And then, as if to remove all doubt concerning the rule it intended to announce, the court continued:

"That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages, as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

"For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:

'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. * * * The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.'

"In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subse-

quent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

"The desire of the Legislature to foster a homogenous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown."

The court evidently determined that the Spartan principle pervaded the Nebraska law. The Oregon law is more truly Spartan. Instead of prohibiting the parent from the right to have his child taught any subject in the German language in a private school, it prohibits him from sending his child to a private school for any kind of instruction. The Oregon School Law was enacted, according to its proponents, for the purpose of developing "ideal citizens". They wrote in the official pamphlet:

> "Mix the children of the foreign-born with the native-born, the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American." (Appendix B.)

These sentences bear a certain ruthless and even cruel implication which is subversive of American ideals of home and parental authority. If the children, against the will of their parents, are to be "mixed" by legislative mandate, it is difficult to perceive where this sort of legislation will end. It may not be long before self-appointed guardians of the public weal will propose that children be taken from the custody and control of their parents altogether.

V.

The School Law Cannot Be Sustained as a Legitimate Exercise of the Police Power.

The right to engage in the calling of teaching is a right protected by the Fourteenth Amendment, and the effect of the School Law is to deprive appellee of that right. But the appellants claim that the legislation should be sustained as a lawful exercise of the police power of the state, and more specifically of the State's power over education. We shall now consider that contention.

We first call attention to the familiar pronouncements of this court on the limitation of the police power. In the case of *Lawton vs. Steel*, 152 U. S. 133, 137, it is said:

> "To justify the state in thus interposing its authority on behalf of the public, it must appear: First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unnecessarily oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

The foregoing was cited with approval in *Meyer vs. The State of Nebraska, supra*, where the court said (262 U. S. 399):

> "The established doctrine is that this liberty (i.e., of the Fourteenth Amendment) may not be interfered with under the guise of protecting the public interest by legislative action, which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."

In *Adams vs. Tanner, supra*, Mr. Justice McReynolds said:

> "Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if

and whenever some ostensible justification is advanced, and the police power invoked."

In *Dobbins vs. Los Angeles*, 195 U. S. 223, 236, the court, speaking through Mr. Justice Day, after stating that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, declared:

> "But notwithstanding this general rule of the law, it is now thoroughly well settled by the decision of this Court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property."

In *Dobbins v. Los Angeles, supra*, the court approved this language of the Supreme Court of California in *Re Smith*, 143 Cal. 368:

> "When the police power is exerted to regulate a useful business or occupation, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue any trade, business or vocation which in itself is recognized as innocent and useful to the community. It is always a judicial question, if any particular regulation of such right is a valid exercise of the police power, though the authority of the courts to declare such regulation invalid will be exercised with the ut-

most caution, and only when it is clear that the ordinance or law declared void passes the limits of the police power, and infringes upon rights guaranteed by the Constitution."

In *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 558, Mr. Justice Harlan said:

> "The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the state when the Constitution was ordained. But, as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police power, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The state has undoubtedly the power by appropriate legislation to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial of persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Again, in *New York ex rel Silz v. Hesterberg,* 211 U. S. 31, 39, it is said:

> "That the legislature of the state is not the final judge of the limitations of the police power, and that such enactments are subject to the scrutiny of the courts, and will be set aside when found to be unwarranted and arbitrary interferences with rights protected by the Constitution in carrying on a lawful business or making contracts for the use and enjoyment of property, is well settled by former decisions of this court."

In harmony with these declarations is the following statement of Mr. Justice Harris, in *Union Fishermen's Co. v. Shoemaker,* 98 Ore. 659, 675:

> "The Legislature, it is true, is not the final judge of the limitations of the police power, and since the legislative action must be reasonably necessary for the public benefit, the validity of all police regulations depends upon whether they can ultimately pass the judicial test of reasonableness."

Most of the foregoing decisions were made in cases where the question related to the validity of ordinances or statutes which merely regulated a business or occupation. The courts will certainly scrutinize more closely a statute whose effect is utterly to destroy a lawful occupation.

It is further well established that,

> "Neither the Legislature nor municipality can, under the guise of police regulations, arbi-

> trarily invade private property or personal rights; and when such regulations are called in question the test should be whether they have some relation to the public health or public safety, and whether such is, in fact, the end sought to be attained." *California Reduction Co. v. Sanitary Reduction Works,* 126 Fed. 29, 34.

Through the foregoing authorities runs the doctrine that the test of an act asserted to have been passed by virtue of the police power of the state is whether it is reasonable, or whether it is merely an arbitrary deprivation of a right secured by the Constitution. And so, Justice Marshall said in *Mehlos v. Milwaukee,* 146 N. W. (Wis.) 882, 884:

> "Too much significance cannot be given to the word 'reasonable' in considering the scope of the police power in a constitutional sense. It took much time, notwithstanding clear declarations, over and over again, on the subject here and by the Federal Supreme and other courts * * * for courts and text writers, in general, to appreciate that the final evidentiary test of the legitimacy of a police regulation is whether it is reasonable under all the circumstances."

It is plain, therefore, that a constitutional guaranty has prevailing force even as against the exercise of the police power, when the action of the legislature is unreasonable and arbitrary, and without reasonable relation to a legitimate end sought to be attained.

The appellee concedes that education is a legitimate field for the exercise of the police power. The state has

a genuine interest in the proper education of youth. It can compel parents to send their children to some school which complies with standards fixed by the state, or require that the children otherwise receive the minimum of learning prescribed. Neither the appellee nor any one else has ever objected to the Compulsory Education Law which has been in effect in Oregon since the year 1907. We do not question the right of the state to regulate the private schools in the interest of the public welfare, to require that proper sanitary and safety precautions be observed, or that certain standards be complied with.

But this law, bearing the misleading title "Compulsory Education", is designed to destroy schools which for many years have played an important and valuable part in the education of the youth of Oregon. It is an attempt by the state, under the guise and pretense of compelling the education of youth, to invest itself with a monopoly of the business of education. This is clearly a law of prohibition and not of regulation. It has no regulatory features.

When the state requires all parents to send their children to schools, public, private or parochial, which must maintain certain standards, it achieves compulsory education. When it abolishes private and parochial schools maintaining those standards, then it merely by arbitrary fiat, takes the property and business of those conducting such schools, without at all furthering the

cause of compulsory education. The destruction of schools does not tend to promote the education of youth.

There is not a single regulatory provision in the School Law. It points to no evil that ought to be remedied; it suggests no abuse that should be removed; and it contains no provision relating, even remotely, to the public health, morals or safety. The only departure from the original law, except a slight change in ages, is that provision which compels public school attendance. The controversy is, therefore, reduced to this single point: Can the state compel a parent to withdraw his children from a private school and send them to a public school, where the instruction and discipline in the private school are in all things equal to the instruction and discipline in the public school? If the private schools were distinctly superior to the public schools in their methods of instruction and in the enforcement of discipline, this law would still compel the child to attend the inferior school.

That the private schools are efficient; that they are properly conducted, and that they conform to all the regulations of the state, are within the appellants' admissions in this suit.

Judge Wolverton, speaking for the court below, said:

> "No one has advanced the argument that teaching by these schools in the grammar grades is a menace, or of vicious poteney, to the state or the community at large, and there appears no

plausible or sound reason why they should be eliminated from taking part in the primary education of youth. It would seem that the act in question is neither necessary nor essential for the proper enforcement of the state's school policy." (Transcript, p. 28.) 296 F. 937.

VI.

BASES OF ACTION ASSIGNED BY APPELLANTS ARE NOT TENABLE.

It requires nimble dexterity, a real race of diligence on the part of the proponents, to discover some slender pretext to sustain this law. Finding no evils in appellee's schools, or in any existing private schools, appellants indulge in pessimistic predictions, and speculations concerning a possible basis of the action of the voters of Oregon in passing the School Law. In the brief for the Governor of Oregon appears the following:

> "The voters of Oregon who adopted the new school law for their state had the right to base their action on the belief that the fact that the great increase in juvenile crime followed so closely after the great increase in the number of children in the United States who were not attending public schools, was more than a coincidence." (p. 39.)

And it is therein further said:

> "The voters in Oregon might also have based their action in adopting this law upon the alarm which they felt at the rising tide of religious sus-

> picion in this country, and upon their belief that the basic cause of such religious feelings was the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded. The voters of Oregon might have felt that the mingling together, during a portion of their education, of the children of all races and sects might be the best safeguard against future internal dissensions with the consequent weakening of the community against foreign dangers." (p. 40.)

In the brief for the Attorney General the following argument is advanced:

> "The very able briefs filed on behalf of appellee in the lower court have failed to reveal any particular in which the alleged deprivation has operated to the disadvantage of either parents or children, except that it has deprived them of an opportunity to impart sectarian religious instruction in connection with the education of children in the schools. Having in mind the fixed purpose of our government in matters relating to the separation of church and state, the continued and consistent efforts that have been maintained to continue them as separate institutions, and the result of the vital legal struggles which have arisen over the question of sectarian instruction in the public schools, we submit that the reason why the people of the state of Oregon, under their initiative powers, have enacted a law requiring that all children shall be educated exclusively in the public schools, when their physical condition so permits, or at home, is apparent, and that in

making such provision they acted within well defined and well established powers of government. In its last analysis, the argument of appellee is that it demands, as a right guaranteed under the Constitution of the United States, the right to conduct an institution for the instruction of children of common school age in opposiion to the public schools maintained by the state, in order that it may therein give sectarian religious instruction which is prohibited in the public schools." (pp. 71, 72.)

1. *Juvenile Crime.*

We admit that juvenile crime has increased in vast proportions during the last few years. There is a Compulsory Education Law in Oregon which requires all children between the ages of nine and fifteen years to attend school. This law has been strictly enforced. The figures relative to the increase in attendance at public and private schools in Oregon during the past five years, as published in the official biennial reports of the State Superintendent of Instruction, are as follows:

	1920	1922	1924
Public School Attendance..	148,412	164,460	175,510
Private School Attendance.	8,477	6,331	5,994

The facts are, therefore, that in Oregon during the last five years, there has been a considerable increase in the attendance at the public schools, while the attendance at private schools has diminished. In the light of these facts, appellants cannot attribute the increase of juvenile crime in Oregon to increased attendance at the

private schools. With this condition existing, the Oregon voters had no right to believe that increased attendance at private schools has any connection with the increase in juvenile crime. The brief for the Governor, at page 46, says truly that "at present the vast majority of the private schools in the country are conducted by members of some particular religious belief." Unless we are to say that the precepts of religion breed criminals, the appellants have imputed to the Oregon voters an unreasoning basis of action.

Some of these assertions remind us of an observation by this court in *Lochner v. New York*, 198 U. S. 45, 62, concerning similar "thin and shadowy" contentions:

> "When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a 'health law,' it gives rise to at least a suspicion that there was some other motive dominating the Legislature than the motive to serve the public health or welfare."

2. *Religious Suspicion.*

The "rising tide of religious suspicion" does not proceed from the private schools, but it is directed against the instruction of children "along religious lines during the most susceptible years of their lives". In Oregon this suspicion has ripened into action. The very purpose of the law, implied in the argument of the Attorney General, is to prevent private schools from giving religious instruction. This, we will show, is an unlawful

purpose. But even if the object were lawful, it could not be attained by the use of prohibited means. The right to teach religion is included in the right of the free exercise of religion. When a penal law is aimed at religious instruction of the young "during the most susceptible years of their lives," the plastic age, when faith is implanted, principles inculcated, and character formed, we can readily see how effective it would be, and how nicely it is calculated to accomplish its purpose.

3. *The "Melting Pot".*

The "melting pot" argument, characterized by the lower court as "an extravagance in simile" (Transcript, p. 21) is pointedly answered in *Meyer v. Nebraska, supra,* by the statement that "a desirable end cannot be promoted by prohibited means" and that "the means adopted * * * exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error." It is also refuted by the following from *Buchanan v. Warley,* 245 U. S. 60, 81:

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."

4. *Church and State.*

There remains the argument based upon the separation of church and state. The existence of private

primary schools has no possible relation to the union of church and state. There are several non-sectarian private primary schools in Oregon, including Hill Military Academy, the other appellee. It is not explained why these schools were not excluded from the operation of the law. This appellee, with all other proprietors of private schools, is sincerely devoted to the principle of the separation of church and state. If a private educational institution, by instructing children in the religion of their parents, in some obscure way violates the policy of separation of church and state, then all religious teaching is a violation. This leads logically to the conclusion that the separation of church and state means that there shall be no church but only the state. And if the state can abolish worthy private schools for the single reason that they teach religion and morality, it has power to prohibit all religious instruction. This argument on church and state is unfortunate. It leads naturally to plainest invasion of constitutional rights.

In view of this argument of the Attorney General, it seems necessary that we state our position upon this important subject of religious education in private schools.

We believe that education in its highest and best sense denotes the drawing out and development of all of the faculties of man. It includes not only physical and mental training,—*mens sana in corpore sano*—but also the formation of character and directing and disci-

plining the will through instruction in religion and morality. We combine religion and morality, approving as we do these words of George Washington in his farewell address to the people of the nation:

> "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the attribute of patriotism who should labor to subvert these great pillars of human happiness, the firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked, where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principles.
>
> "It is substantially true that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric?"

Morality, then, being of such supreme importance to men and to government, and religion being thus in-

dispensable to morality, the appellee believes that instruction in religion and morality cannot be adequately accomplished unless it form an integral part of the daily education of youth, and a part no less vital than instruction in mathematics, the sciences, the languages, or any other branch of human knowledge. If one were required to make a choice between knowledge and the development of character, if either must be neglected, it should not be the development of character.

We fully accord to others the right to disagree with us and to act upon their own convictions. We would coerce no one to our way of thinking nor to our course of action. We advocate the enactment of no laws to compel others to adopt our views. But we claim the same right for ourselves, both as to our principles and our practices. These, we maintain, have no evil in them, but are worthy in themselves, are for the betterment of the individual and the state, are in harmony with American principles, and have received the approval of the wise and virtuous leaders of the nation from Washington to the present Chief Executive.

And any law, whether enacted by the people or their representatives, which purposes under the guise of separating church and state, to prevent private schools from giving religious education, and to deprive children of the blessings of such education, is not only extremely unwise, but is arbitrary, oppressive and violative of rights which, in this country for one hundred and thirty

years, have been considered to be of the very essence of liberty itself. We found these statements on the Constitutions of the United States and of the State of Oregon, on decisions of this Court and of the Supreme Court of the State of Oregon, on the well-known facts of history, and the commonly accepted fundamentals of American Government.

This court, in the opinion in the case of *Myer v. State of Nebraska, supra,* took occasion to quote from the celebrated Ordinance of 1787 these words:

> "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Mr. Story, in his work on Equity Jurisprudence, 2d Ed., Sec. 1341, says that parents are intrusted with the custody of their children "upon the natural presumption that the children will be brought up with a due education in literature, morals and religion."

The opinion in *Commonwealth v. Armstrong, supra,* says that:

> "The word 'education' in the statement of a father's duty toward a child, to the effect that it is his duty to provide for the child's education means not merely instruction in the pursuits of literature, but comprehends a proper attention to the moral and religious sentiments of the child."

All over this country, thinking men of today, as they look about and see the results of education that imparts knowledge, but fails to build up character through the aid of religion, as they view the increase of crime and the steadily declining moral standards of a great nation, are insisting that children shall receive religious instruction as part of their education, and that some way be devised to provide religious instruction for children attending the public schools.

The very law under which the appellee was created (Sec. 6698, Oregon Laws, et seq.), grants to religious societies the right to incorporate for the purpose of carrying out their objects, and by virtue of the provisions of that law the appellee, a religious society, bearing indeed the name of the Founder of Christianity, was commissioned to undertake the care and education of youth, and to establish and maintain schools for the care and education of youth.

Even as this is written, the Legislature of the State of Oregon (Thirty-third Legislative Assembly), has passed Senate Bill, No. 19, approved Feb. 9, 1925, which reads as follows:

> "Section 1. That any child attending the public school, on application of his guardian or either of his parents, may be excused from such school for a period or periods not exceeding one hundred and twenty (120) minutes in any week to attend week-day schools giving instruction in religion."

To urge the value of religion, and that it has a legitimate place in the education of youth, is only to demonstrate what is approved by the common opinion of mankind. If we are to be fettered by legislation induced by "skillfully directed agitation", to use the language of Mr. Justice McReynolds, which has for its object the suppression of religion, and to thwart the efforts of those who would lay the foundations of good citizenship by instilling into the minds of the youth of the land the principles of morality based on religion, then indeed, we have departed from the ideals of the men and women who came to this country from the old world—the Puritan to New England, the Quaker to Pennsylvania, the Catholic to Maryland—to escape the bane of religious persecution; and we have abandoned those benign principles of religious liberty which our forefathers wrote into the constitutions of the United States and of the separate states.

The first Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

This guarantee of religious freedom is included within the "liberty" of the Fourteenth Amendment. *Meyer v. Nebraska, supra.*

The Oregon Constitution contains similar guaran-

ties in Article I, the Bill of Rights. Sec. 2 of that article, reads:

> "All men shall be secured in the natural right to worship Almighty God according to the dictates of their own consciences."

In Section 3, we find:

> "No law shall in any case whatever control the free exercise and enjoyment of religious opinion, or interfere with the rights of conscience."

Section 4 provides that:

> "No religious test shall be required as a qualification for any office of trust or profit."

Section 5, that:

> "No money shall be drawn from the treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious services in either house of the legislative assembly."

And Section 6, that:

> "No person shall be rendered incompetent as a witness or juror in consequence of his opinions on matters of religion, nor be questioned in any court of justice touching his religious belief to effect the weight of his testimony."

The courts give no narrow interpretation to these provisions, nor do they hold that the rights therein expressed are grudgingly conceded. Both the Supreme Court of Oregon and the Supreme Court of the United

States have declared that in the guaranty of religious liberty is included the right to teach religion, and this court has held that for the Federal Government to withhold trust moneys from the Indians in order to prevent them from receiving religious education at their own expense, would be to prohibit the free exercise of religion among the Indians.

In the case of *Liggett v. Ladd,* 17 Or. 89, 94, we find this language:

> "The right of mankind to believe and *teach* such doctrines regarding religion as meet the approval of their consciences is recognized under our form of government as inherent; it is *freely* accorded to every sect and denomination in the land, and is so interwoven with the principles which underlie our political fabric that it cannot be taken away without the general consent or a violent revolution. The law not only tolerates the privilege, but protects every one in the enjoyment of it. The people are entitled, as an incident of such right, to form associations, adopt creeds, organize churches, and establish seminaries of learning for the advancement of their peculiar tenets of faith, and to acquire property and erect buildings to aid them in accomplishing that end."

In *Watson v. Jones,* 13 Wall, 679, 728, the Supreme Court said:

> "In this country the *full* and *free* right to entertain any religious belief, to practice any religious principle, and to *teach* any religious doctrine which does not violate the laws of morality and

> property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to no dogma."

The case of *Reuben Quickbear v. Francis E. Leupp,* 210 U. S. 50, bears directly on this phase of the controversy.

This case involved the right of the Secretary of the Interior to enter into contracts with the Bureau of Catholic Indian Missions, by which certain moneys known as "treaty funds" and "trust funds," should be paid over to the Bureau to be used for the support, education and maintenance of Indian pupils of the Sioux tribe of Indians at the St. Francis Mission Board School on the Rosebud reservation. The payment of money upon such contracts by the Secretary of the Treasury was sought to be enjoined on the ground that Congress had in the year 1896 declared it to be:

> "the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school."

These treaty funds and trust funds, as the Supreme Court held, were moneys which belonged really to the Indians, and the Court decided that to pay such moneys out under a contract with the Bureau of Catholic Indian Missions, was not an "appropriation" within the meaning of the expression of Congress above quoted.

In addition to the holding on that question, the

Court said in answer to a contention very similar to that of the Attorney-General (p. 81):

> "But it is contended that the spirit of the Constitution requires that the declaration of policy that the government 'shall make no appropriation whatever for education in any sectarian schools' should be treated as applicable, on the ground that the actions of the United States were to always be undenominational, and that, therefore, the government can never act in a sectarian capacity, either in the use of its own funds or in that of the funds of others, in respect of which it is a trustee; hence, that even the Sioux trust fund cannot be applied for education in Catholic schools, even though the owners of the fund so desire it. But we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof. The court of appeals well said: 'The treaty and trust moneys are the only moneys that the Indians can lay claim to as matter of right; the only sums on which they are entitled to rely as theirs for education; and while these moneys are not delivered to them in hand, yet the money must not only be provided, but be expended, for their benefit, and in part for their education; *it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians,* and such would be

the effect of the construction for which the complainants contend."

By confession of the Attorney General of the State of Oregon, commendable for its frankness, though astonishing in its import, we have it that the School Law was enacted to prevent private schools from giving religious instruction to the young. If this be so, the law must be held unconstitutional because the end is clearly not one within the competency of the State to accomplish. That purpose is to prohibit the free exercise of religion.

VII.

THE ACT IMPAIRS THE OBLIGATION OF APPELLEE'S CONTRACT WITH THE STATE ARISING OUT OF ITS CHARTER.

Ever since the famous decision in the *Dartmouth College Case* it has been settled law that the charter of a corporation constitutes a contract between the corporation and the State under whose laws it was organized, the obligations of which cannot be impaired by subsequent legislation.

Dartmouth College v. Woodward, 4 Wheat 518.
Carondelet Canal Co. v. State, 233 U. S. 362; 34 Sup. Ct. 627.
Wilmington Co. v. Alsbrook, 146 U. S. 279; 13 Sup. Ct. 72.

Louisville Gas Co. v. Citizens Co., 115 U. S. 683; 6 Sup. Ct. 265.
Liggett v. Ladd, 17 Or. 89.
Lorntsen v. Union Fisherman's Co., 72 Or. 540.

The contract consists of the offer by the statute and a compliance with its terms. The rights granted by the charter are stated in the law under which the corporation was formed and in the Articles of Incorporation drawn in accordance with that law. By Article II of the Articles of Incorporation of appellee it is provided that the purposes of the appellee should be, among others, the following:

> "The care of orphans and the education and instruction of youth, and to establish and maintain academies or schools for the care and education of youth in the cities and towns of the State of Oregon."

And by Article III it is provided:

> "* * * and the income and revenue are derived from tuition charged for the education and instruction of youth."

At the time of the original incorporation of appellee the Act under which it was incorporated provided only for the incorporation of churches and religious, benevolent, literary and charitable societies. See *Deady's Code (1886), pages 632-634.* Afterwards and at the Legislative Assembly of 1903 an act was passed authorizing the incorporation of educational corporations under the

same act. See pages *176 and 177 of General Laws of Oregon for 1903.* This latter act contains a provision that where educational corporations have attempted, prior to 1903, to incorporate under the original act and had properly filed their articles of incorporation, their articles were ratified and confirmed and from 1903 on they should be deemed bodies corporate under the act.

On November 11, 1880, appellee duly filed with the Secretary of State and with the County Clerk of Multnomah County, Oregon, its Articles of Incorporation, a copy of which is attached to the bill of complaint. (Transcript p. 14).

The said acts grant to corporations organized thereunder the right to incorporate for the purpose of carrying out the objects of such educational society, and confer on the corporation, among others, the powers:

1. To sue and be sued;
2. To contract and be contracted with;
3. .....

4. To purchase, receive, possess and dispose of such real and personal property as may be necessary or convenient, to carry out the object of said corporation.

There was therefore a direct grant to appellee by the State of the right, as a corporation, to pursue and carry on the educational business of conducting schools, that appellee was theretofore conducting as a society; and a right to contract concerning that business and the

right to be contracted with by others concerning the same; and a right to acquire and possess property, including the building up and enjoyment of a good will and patronage for that business, necessary or convenient to carry out the object of the corporation.

The contract between the State and the appellee very clearly confers upon and vests in it certain rights, particularly those just mentioned, so that when the School Law was enacted in 1922, appellee was then possessed of and there were then vested in it the right to conduct its schools and receive its income and revenue therefrom, and the right to possess real and personal property for the purpose of conducting those schools, and the right to enjoy the good will and patronage of its schools. These were all vested rights.

There is not in the acts, under which appellee was organized any reserve clause, whereby the Legislature reserved power to amend, alter or repeal any of the charters created under those acts, or power to amend, alter or repeal those acts themselves so as to affect in any way corporations organized prior to the amendment, alteration or repeal.

The obligations assumed by the State in the contract are that appellee should possess the right to conduct and carry on its business of operating schools, and to receive therefrom its income and revenue; and to possess property for school purposes; and to possess and enjoy the good will and patronage of its schools.

Can it be said that an act which prohibits appellee from conducting and carrying on its schools, which renders valueless its property devoted to school purposes, and which deprives plaintiff of the good will and patronage of its schools, does not impair the obligations of this contract?

The Supreme Court of Oregon has held in two cases that a corporation organized under the general corporation laws of Oregon has a valid right in the name conferred upon it by its Articles of Incorporation and that a subsequent act of the Legislature attempting to change that name or make it unlawful to use it was an impairment of the obligation of the contract and deprived the corporations of their property without due process of law.

Liggett v. Ladd, 17 Or. 89.
Lorntsen v. Union Fishermen's Co., 71 Or. 540.

Sometimes general corporation laws contain a reservation of power in the state whereby those laws may be amended, altered or repealed, without any limitation whatever, so that such general laws after amendment or alteration become the measure of power which a previously organized corporation possesses; or, in case of a subsequent repeal, the corporation may be dissolved and terminated altogether.

The well known case of *Berea College v. Kentucky 211 U. S. 45; 29 Sup. Ct. 33,* illustrates this situation.

Where such are the facts, a corporation cannot complain that some subsequent legislation operates to impair the obligation of its contract with the state, because the reserved power in the law, under which the corporation was formed, becomes a part of the contract and authorizes the state to make such amendments and alterations as it sees fit, even to terminating the corporation altogether.

By *Section 2 of Article XI of the Oregon Constitution* as it was prior to the 1906 amendment and at the time of plaintiff's incorporation, it was provided:

> "Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights." Bellinger & Cotton's Ann. Code, p. 60.

The effect of this section is an inhibition against any subsequent legislation by way of amendment or repeal that shall impair or destroy any rights acquired by the corporation by its organization and compliance with the corporation laws of the state. The right reserved to the state is to amend and repeal its corporation laws with reference to prospective corporations, and to amend and alter them as to both prospective and existing corporations in matters which do not impair or destroy the grants of power and rights enjoyed by existing corporations. In other words, insofar as the corporation laws

grant rights and powers, which become vested in some corporation by its acceptance of and acting upon them, the legislature is prohibited from either altering, amending or repealing them. The power reserved to alter, amend or repeal is limited to such matters as will neither impair nor destroy the rights and powers granted to existing corporations.

Such is the interpretation placed by the Oregon Supreme Court upon *Section 2 of Article XI of the Oregon Constitution* as it stood when plaintiff was incorporated. Such is the plain holding of the case of *Lorntsen v. Union Fisherman's Co., 71 Or. 540.*

In that case the defendant, whose full name was Union Fishermen's Co-operative Packing Co., was a corporation organized before the amendment of *Section 2 of Article XI of the Constitution.* Afterwards the legislature enacted what is known as the Co-operative Association Act, which provided for the incorporation of co-operative associations. Among the provisions of this latter Act is a prohibition, enforced by a penalty, against any person or corporation, other than one incorporated under the Act, using the word "Co-operative" as a part of its name. Defendant's corporate name contained that word. The Supreme Court held that the grant by the State to defendant of its corporate name was a right vested in the defendant to use that name, and that the State could not, under *Section 2 of Article XI of the Constitution*, alter or amend that right.

Mr. Justice Burnett, who wrote the opinion, said:

"Under this statute the defendant was organized as a corporation, and has since then conducted its affairs using the corporate name there specified. The substance of the situation is that through this statute the state offered certain corporate privileges and immunities to those who accepted its terms, which offer was accepted in this instance by the filing of articles of incorporation and organization of the defendant.

"From Dartmouth College v. Woodward, 4 Wheat. 518 (4 L. Ed. 629), down to the present time, the principle has been maintained that such an offer and acceptance constitute a contract between the state and the corporation, the obligation of which cannot be impaired by any subsequent legislation. It is a compact which is within the protection of Article I, Section 10 of the national Constitution forbidding any state to pass any law impairing the obligation of contracts, and Article I, Section 21, of our state Constitution, containing the same prohibition. The identical question has been settled by the utterances of Mr. Chief Justice Thayer in Liggett v. Ladd, 17 Or. 89, 100 (21 Pac. 133, 137):

" 'The legislature cannot alter the charter of any private corporation. The old case of Dartmouth College v. Woodward, 4 Wheat. 518 (4 L. Ed. 629), settles that question. * * * When the Corvallis College was organized into a corporation, the name it assumed and by which it was to be known, was specified in its articles of incorporation; and the legislature had no power to change it, or to merge the corporation into another organization, either real or imaginary.' "

The Court further said on page 545 of the 71st Oregon Report:

> "It is plain that in this respect the Act, as applied to a corporation already in existence when it was passed, is unconstitutional, in that it violates the charter or contract with the State. By the terms of the Constitution, as it then stood, a part of that contract was that, while the legislature could amend or repeal laws relating to the formation of corporations, it could not impair nor destroy any vested corporate rights. All the cases cited by plaintiff on the subject of charter changes are those where unlimited power was reserved for that purpose, or the change was consented to by the corporation."

The "terms of the Constitution" alluded to by Mr. Justice Burnett in the foregoing quotation were the provisions of *Section 2, Article XI*, before its amendment.

The interpretation thus placed upon that constitutional provision by the Oregon Supreme Court is that it inhibits the State from altering, amending or repealing powers and rights, which the state has actually granted to existing corporations, and permits the amendment or alteration or repeal of corporation laws in their prospective operation only. The construction of the Oregon Supreme Court is exactly the same as though the constitutional provision read as follows: "All laws passed pursuant to this section may be altered, amended or repealed in their prospective operation, but cannot be altered or amended or repealed so as to impair or

destroy any power or right granted by the State to an existing corporation." In the Lorntsen case subsequent legislation, which compelled a mere change in the name of an existing corporation, was held unconstitutional and void as impairing the obligation of the corporate contract and as destroying a vested right of property possessed by defendant. The vested right was the right granted by defendant's charter to use the corporate name. It differs in kind or character not at all from the vested rights granted to and possessed by appellee in this suit, which are being impaired and destroyed by the school law. The right to conduct schools and therein educate youth; the right to receive, from the tuition charged in said schools, income and revenue; the right to acquire and possess property for school purposes, including the good will and patronage of the schools, are all granted to appellee by its compliance with the existing corporation laws. And these rights are just as valuable and were as certainly granted and vested as was the right to use the corporate name.

The same interpretation of the Oregon Constitution was made by the Oregon Supreme Court in *Liggett v. Ladd, 17 Or. 89,* which is cited in the *Lorntsen Case.*

The interpretation by the Oregon Supreme Court of the Oregon Constitution is binding and conclusive upon the United States Courts.

U. S. Const. Art. IV. Sect. 1.
Wade v. Travis, 174 U. S. 509.

Fairfield v. Gallatin County, 100 U. S. 359.
Luther v. Borden, 7 How. (U. S.) 1.

The decisions in the *Liggett v. Ladd* and in the *Lorntsen* cases being binding on the Federal Courts, the *Berea College Case*, 211 U. S. 45, and similar cases, are entirely inapplicable. Those cases are founded on the proposition that the enabling act or the constitution reserved an unlimited power to amend, alter and repeal corporate charters and, therefore, the corporation could not complain of any legislative act, special or general, which impaired or destroyed its corporate rights.

In this case, however, neither the enabling act nor the constitution reserved any such power, but, on the other hand, as interpreted by the Oregon Supreme Court, the Oregon Constitution expressly inhibits any legislation which shall impair or destroy the rights and powers granted by the State to corporations.

Section 10 of Article 1 of the United States Constitution provides that:

> "No state shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

The Act manifestly violates this inhibition because its provisions and the result of its going into effect will and do impair the obligations of the contract between the State of Oregon and appellee.

Nothing better illustrates our point than a comparison of the *Berea College Case* with the case of *Chicago*

Co. v. Wisconsin, 238 U. S. 491. In the former it was held that the state might, under reserved power in their constitutions or corporation laws, amend and alter corporation charters at will. The latter case held that under such reserved powers the state could not alter or amend charters. This apparent conflict is readily explained when it is seen that the *Berea College Case* so held because that was the construction placed upon the constitution and laws of Kentucky by the Supreme Court of Kentucky; and the *Chicago Co. v. Wisconsin Case* so held because that was the construction placed upon the constitution and laws of Wisconsin by the Supreme Court of Wisconsin.

On this point, therefore, the Supreme Court of Oregon in the cases of *Liggett v. Ladd, supra,* and *Lorntsen v. Union Co., supra,* has already said the last word.

While it is true, as counsel for the appellants urge, that the State cannot bargain away its police power, and consequently that laws enacted in the exercise of that power do not impair the obligation of contract, yet this latter doctrine is necessarily qualified by the condition that such laws must be a legitimate exercise of the police power. Acts which are a pretended exercise of that power, but which bear no reasonable relation to any end which the State is competent to effect, may constitute an impairment of the obligation of a contract.

The case of *State v. Richmond & Danville R. R. Co.,*

73 N. C. 527, was a criminal prosecution for the violation by the defendant of a law prohibiting it from changing the gauge of its railroad track. The company claimed that the law violated its charter, and the state that the law was passed in the exercise of its police power. The Court held that it was not a valid exercise of police power, and therefore impaired the obligation of the contract arising out of the company's charter. It was said at page 433:

> "A state cannot violate its contract under a pretended act of its police power. The act must be *bona fide* intended to relieve some evil within the reach of that power, and strictly applicable to that end."

In the case of *P. W. & B. R. R. Co. v. Bowers,* 4th Houst. (Del.) 506, the Court held invalid as impairing the obligation of the contract created by the company's charter a law of the state which assumed the right to adjust the tariffs for the railroad. At page 537 the Court, after giving instances of acts which the state could legally pass as police regulations, said:

> "Such acts leave the franchise unimpaired and simply regulate the exercise of it in some particulars plainly essential to the general safely, health, or comfort of society. But quite different are acts which directly touch the constitution of the corporation, or abridge or modify any of those corporate powers which are essential to the very ends of its creation; such powers, for example, as the right to operate a railroad at all,

> the right to take tolls or fares and freights, or to adjust their tariff of such charges. These are not police regulations, but are in substance and effect amendments of the charter, and it is most obvious that, if under color of the police power, corporations may be thus dealt with, the constitutional provision, so solemnly adjudged by the Superior Court to be a protection to their rights is, after all, as to them wholly nugatory."

Again it was said at page 533:

> "Now, what will or will not amount to such a material alteration of the charter as to bring a law into conflict with the constitutional prohibition it may not be easy to define, but it is sufficient and quite safe to say that an act having the effect to abridge or restrict any power or privilege vested by the charter which is material to the beneficial exercise of the franchise granted, and which must be supposed to have entered into the consideration which induced the corporators to accept the charter and to assume the duties imposed by it, is such an alteration as the constitutional provision forbids, and that any act so operating is invalid."

But even where their exists in the State the reserved power to alter or amend corporate charters, this power is not unlimited, and must not be exercised in an unreasonable or offensive manner, or so as to "abridge * * * those corporate powers which are essential to the very ends of its creation."

In the case of *Chicago M. & St. P. R. Co. v. Wisconsin*, 238 U. S. 491, 35 Sup. Ct. 869, the Court held

unconstitutional a statute prohibiting a railroad company from lowering the upper berths in a sleeping car when they were not occupied. With reference to the question of impairment of the company's contract, the Court, by Mr. Justice Lamar said (p. 501):

> "In the brief of counsel for the state it is argued that the statute can be sustained as a valid exercise of the state's reserved power to alter the charter of the company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed, such a ruling would seem to have been opposed to State ex. rel. Northern P. R. Co. v. Railroad Commission, 140 Wis. 157, 121 N. W. 919, and the Water Power Cases, 148 Wis. 124, 38 L. R. A. (N. S.) 526, 134 N. W. 330, where it was held that the right to amend a charter does not authorize the taking of the company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court. For example, in Shields v. Ohio, 95 U. S. 324, 24 L. Ed. 359, it was said that 'the power of alteration and amendment is not without limit. The alterations must be reasonable * * * and be consistent with the scope and object of the act of incorporation.' * * * Again, in Stearns v. Minnesota, 179 U. S. 223, 259, 45 L. Ed. 162, 180, 21 Sup. Ct. Rep. 73, it was held that the reserved right to amend a corporate charter 'does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by * * * taking of property without due process of law.' Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 690, 43 L. Ed. 861, 19 Sup.

> Ct. Rep. 565; Stanislaus County v. San Joaquin & K. River Can & Irrig. Co., 192 U. S. 201, 48 L. Ed. 406, 24 Sup. St. Rep. 241; Sinking Fund Cases, 99 U. S. 720, 25 L. Ed. 501; Miller v. New York, 15 Wall. 498, 21 L. Ed. 104; see also Delaware L. & W. R. Co. v. Public Utilities, 85 N. J. L. 28, 38, 88 Atl. 849, where it was held that, under such a power, the company could not be required to furnish free transportation to certain designated officials."

The unreasonableness of the School Law has been shown; that it is inconsistent with the scope and object of the appellee's charter cannot be controverted.

VIII.

The Court Has Jurisdiction of the Cause

Two questions will be considered here: First, has the appellee capacity to bring this suit? Second, is the suit premature? The discussion will be brief, as the Attorney General has expressly waived argument on these points, and has asked the Court to determine the constitutional questions. (Brief, p. 12.)

(a) The general rule respecting the right of a person to test the constitutionality of a statute is stated in 12 *Corpus Juris*, at p. 763, as follows:

> "Any person whose rights are prejudiced by the operation of the statute may raise the question as to its constitutionality. Thus a person may question the constitutionality of a statute

> the effect of which is to deny him a right that otherwise he would have. A corporation may invoke the protection of the constitution to the same extent as an individual."

In another part of this brief, the injurious effect of the operation of the School Law on appellee has been shown, and we will not go over that ground again.

The fact that the statute is not directed against the appellee *eo nomine* can make no difference when its inevitable effect is to inflict direct and certain injury upon it. This rule is applied in ***Truax v. Raich, supra,*** where the alien employee on whom the statute laid no command, maintained a suit to enjoin its enforcement; and likewise in the case of ***Nebraska District v. McKelvie, supra,*** where the corporation was permitted to sue to prevent the prosecution of its teachers. See also ***Terrace v. Thompson, supra, Savage v. Jones,*** 225 U. S. 501 and ***Buchanan v. Warley, supra.***

(b) The suit is not premature. At the time the appellee filed its Bill of Complaint, the injury to its schools had already commenced, as the direct result of the appellants' threats to enforce the School Law, and to prosecute parents who should refuse to send their children to the public schools. Feeling that the schools of the appellee would be compelled, for lack of patronage, to close by September, 1926, parents had commenced to withdraw their children from the appellee's schools, and to transfer them to others, known to be

permanent. From this naturally followed impairment of credit, and inability of appellee to raise funds for repairs, improvements and expansion. Its schools were in fact moribund institutions, condemned as unlawful, their term of life limited by popular decree. The lower court said concerning this situation:

> "Now, although the time at which the act is to become effective is somewhat remote, it is quite apparent, from the allegations of the bill, the work of destruction of complainants' occupation has already set in. They are losing their patronage, traceable directly to the fact that the act is a statute duly adopted and promulgated. Parents are looking to the future, and are laying their plans to meet the exigencies to arise. The curriculum of the grade schools requires several years of attendance, and if parents must, on the taking effect of the statute, send to the public schools many of them are prepared to do so now, or as convenience may suggest. Hence the drawing away of complainant's patronage has set in, and will continue with increased progression until the day when all will be lost. This is not only the alleged result of the passage of the act, but it is the most natural and consequential thing to expect. The damage, of course, is irreparable, and compensation does not afford adequate relief. The injury being of a quality that is continuing and accelerating, it must be staid if the ends of justice are to be met. * * *
>
> "The very purpose of placing the effective date so far ahead was to give ample time for the parochial and private schools to adjust themselves to the new conditions, which is really a con-

fession on the part of the lawgivers that such schools are going to be hurt, and that seriously, if not irreparably." (Transcript, pp. 24 and 25.) 296 Fed. 933.

The injury sustained by the appellee is thus attested in the appellants' Motion to Advance filed herein:

> "That the effect of the present uncertainty regarding the validity of said statute is to cause parents, guardians and others having in charge the education of children who are, or will be, affected by the provisions of said statute, to transfer many of such children from private and parochial institutions to the public schools, to the material disadvantage and financial injury of the persons, corporations, etc., owing and conducting such private and parochial institutions, and contrary to the wishes of the parents, guardians, etc., of said children, if said statute is unlawful."

It further appears in the Motion to Advance:

> "That if said statute shall be held by this court to be valid the effect thereof will be to increase the attendance at certain of the grade schools of the State of Oregon, and to require arrangements to be made for additional facilities for the housing and instruction of children who will attend the said schools.
>
> "That in the ordinary course of events a decision of this court in the said cause will not be rendered in time to permit of arrangements for such increased facilities being made after said decision and by the time same will be required, should the said statute be held valid, but that if the said cause may be heard and determined at

> this term all parties concerned will have notice of such decision in time to make necessary arrangements required thereby prior to said September 1, 1926, or to avoid unnecessary expenditures for said additional facilities should the decision of this court be that said statute is invalid."

The general rule applicable is stated by Mr. Justice Butler in the case of *Terrace v. Thompson, supra.* as follows (263 U. S. 214):

> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the State is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity."

Though the time for the Act to go into effect was, as the lower court said "somewhat remote," yet, in view of the injury which had already set in, and its progressive and cumulative character, as well as the inevitability of the enforcement of the Act, there ought to be no question but that the lower court was right in exercising the beneficient power of a court of equity to stay the injury. The fact that there is no precise precedent is of small importance.

It is said *32 Corpus Juris, p. 14. Sec. 13:*

> "It is not a fatal objection that the use of the writ for the particular purpose for which it is sought is novel. Courts may amplify remedies and apply rules and general principles for the advancement of substantial justice. If that were not so, and courts were confined to particular precedents, there would be no power to grant relief in new cases constantly occurring."

In *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 746, 751, we find this language:

> "It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief. Mr. Justice Brewer, sitting in the circuit court for Nebraska, said:
>
> > " 'I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand.' "

In the case of *Nashville C. & St. Ry. Co. v. McConnell*, 82 Fed. 65, 76, the court said:

"I return now to the argument based on the ground that this is a novel application of the injunction, not sanctioned by previous precedent directly in point. This argument, carried to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well-known history of the subject. Of course, this contention has been overruled, and precedent after precedent established from time to time to meet new conditions and to do full justice, until the argument has long since lost most of its force, although it is still maintained in form. It has been in answer to arguments like this that the great chancellors have stated time and again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion regulated by analogy; by what would be manifestly just in view of all the existing conditions, and requiring as a condition that there is no adequate remedy at law. Beyond this the courts have not gone, in the way of placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy is progressive, that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new

> conditions, and this involves an extension of the remedy, and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civilization."

In *Dodge v. Cole*, 97 Ill. 338, 364, it is said:
is said:

> "The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case, or at some distant time, granted relief under similar circumstances, but rather upon the necessities of mankind, and the great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages and all people. * * * When it is clear the circumstances of the case in hand require the application of those principles, the fact that no precedent can be found in which relief has been granted under a similar state of facts, is no reason for refusing it."

The principle runs through the decisions that one does not have to await the consummation of threatened injury before applying for injunctive relief. Thus, it is said in *Vicksburg Waterworks Co. v. City of Vicksburg*, 185 U. S. 65, 82:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal

action may be taken cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made when bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties, in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

The *Vicksburg Waterworks* case is cited in the somewhat similar case of *Palatka Waterworks v. City of Palatka*, 127 Fed. 161, as authority for entertaining jurisdiction of a suit to enjoin enforcement of an ordinance before the time fixed for it to go into effect, the Court saying that the company is not required to wait until the city has taken some further step to displace its alleged rights under the contract, and then sue for damages.

In the case of *Pennsylvania v. West Virginia*, 262 U. S. 553, 592, Mr. Justice Van Devanter said:

"The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in

> actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."

For other applications of the principle, see *Detroit Creamery Co. v. Kinnane,* 264 Fed. 845 (affirmed 252 U. S. 102); *Willcox v. Consolidated Gas Co.,* 212 U. S. 19; *Leverich v. Mayor, etc., of Mobile,* 110 Fed. 170; *Davenport v. Kleinschmidt,* 6 Mont. 502.

The case of *Terrace v. Thompson, supra,* is also a valuable precedent. Although the act was in effect there was no violation thereof by the plaintiffs. Nevertheless the Court sustained a suit brought to enjoin enforcement of the Act, because, as stated by Mr. Justice Butler (263 U. S. 215),

> "the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants as to which they have no remedy at law which is as practical, efficient or adequate as the remedy in equity."

In connection with the showing under the Amended Bill (Par. XIX, Transcript, p. 12), and also in the Motion to Advance, as to the public importance of this suit, and the profound interest that the people of Oregon have in its early determination, attention is called

to the following language from the opinion in *Detroit v. Detroit Citizens Street Ry. Co.*, 184 U. S. 368:

> "It is a matter of general public interest, as well as of vital importance to the complainant, that the question involved in this litigation be determined at the earliest possible moment, and once for all, and thus a multiplicity of suits and other complications be prevented."

Conclusion

We submit, therefore, that the measure under review bears no relation to the public health, morals, safety or welfare; that it is not a statute of regulation, but of prohibition, and that it deprives appellee of its property without due process of law. Its real purpose, in the guise of police regulation, is to destroy private primary schools in Oregon. That would be its immediate effect. But the principle involved is of vital interest to all private schools in this country of every grade and class. If the state can thus destroy the primary school, it can destroy the secondary school, the college and the university. However inveterate our habits of classification, there is no real basis to distinguish a primary school from a university in the matter of interference by the state. Every argument advanced in support of this measure could be urged with equal propriety and force in favor of a similar measure aimed at universities under private management and control. Harvard, Yale, Columbia,

Princeton or any of the other great private institutions of learning would be quite as amenable to this sort of interference as the humblest primary school in a remote district of Oregon. All could be swept away, and with them would depart an influence and an inspiration that this country can ill afford to lose. The whole province of education could be taken over by the state, and only those subjects taught, and those theories and doctrines expounded to which the state should give its approval.

The legislation is revolutionary in character. The power assumed by its enactment has never before been asserted in America. It cannot be that such a power really exists, or is compatible with the spirit of our free institutions.

The School Law is unconstitutional and void, and the decree of the lower court should, therefore, be affirmed.

Respectfully submitted,

J. P. KAVANAUGH,
JAY BOWERMAN,
DAN J. MALARKEY,
HALL S. LUSK,
E. B. SEABROOK,
F. J. LONERGAN,
Counsel for Appellee.

Appendix A.

(Ballot Title of School Law)

A MEASURE.

To amend section 5259, Oregon Laws, relating to compulsory education, to be submitted to the legal electors of the state of Oregon for their approval or rejection at the regular general election to be held November 7, 1922; proposed by initiative petition filed in the office of the secretary of state of the state of Oregon, July 6, 1922.

The following is the form and number in which the proposed measure will be printed on the official ballot:

Initiative Bill—Proposed by Initiative Petition.

Initiated by Ira B. Sturges, Baker, Oregon; Dr. Robert C. Ellsworth, Pendleton, Oregon; Harold Baldwin, Prineville, Oregon; W. B. Daggett, Redmond, Oregon; Lewis H. Irving, Madras, Oregon; Collin E. Davis, The Dalles, Oregon; Leslie G. Johnson, Marshfield, Oregon; C. A. Swope, Grants Pass, Oregon; W. F. Harris, Roseburg, Oregon; John R. Penland, Albany, Oregon; J. R. Jeffrey, Seaside, Oregon; F. C. Holibaugh, St. Helens, Oregon; O. O. Hodson, McMinnville, Oregon; E. L. John-

son, Hillsboro, Oregon—COMPULSORY EDUCATION BILL—Purpose: Requiring any parent, guardian or other person having control, charge or custody of a child over eight and under sixteen years of age, from and after September 1, 1926, to send such child to a public school during the entire school year, excepting: '(a) children physically unable; (b) children who have completed the eighth grade; (c) children between the ages of eight and ten living more than one and one-half miles, and children over ten years of age living more than three miles from a public school, except when transportation is furnished; '(d) children taught by parent or private teacher.

Vote YES or NO

314 Yes.

315 No.

Appendix B

(Affirmative argument printed in official pamphlet by proponents of School Law.)

"Do you believe in our public schools?

Do you believe they should have our full, complete and loyal support?

What is the purpose of our public schools, and why should we tax ourselves for their support?

Because they are the creators of true citizens by common education, which teaches those ideals

and standards upon which our government rests.

Our nation supports the public school for the sole purpose of self-preservation.

The assimilation and education of our foreign born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.

We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.

Mix the children of the foreign-born with the native-born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American.

The permanency of this nation rests in the education of its youth in our public schools, where they will be correctly instructed in the history of our country and the aims of our government, and in those fundamental principles of freedom and democracy, reverence and righteousness, where all shall stand upon one common level.

When every parent in our land has a child in our public schools, then and only then will there be a united interest in the growth and higher efficiency of our public schools.

Our children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, there to absorb the narrow views of life, as they are taught. If they are so divided, we will find our citizenship composed and made up of cliques, cults and factions, each striving, not for the good of the whole,

but for the supremacy of themselves. A divided school can no more succeed than a divided nation.

The inspiration for this act is the following resolution:

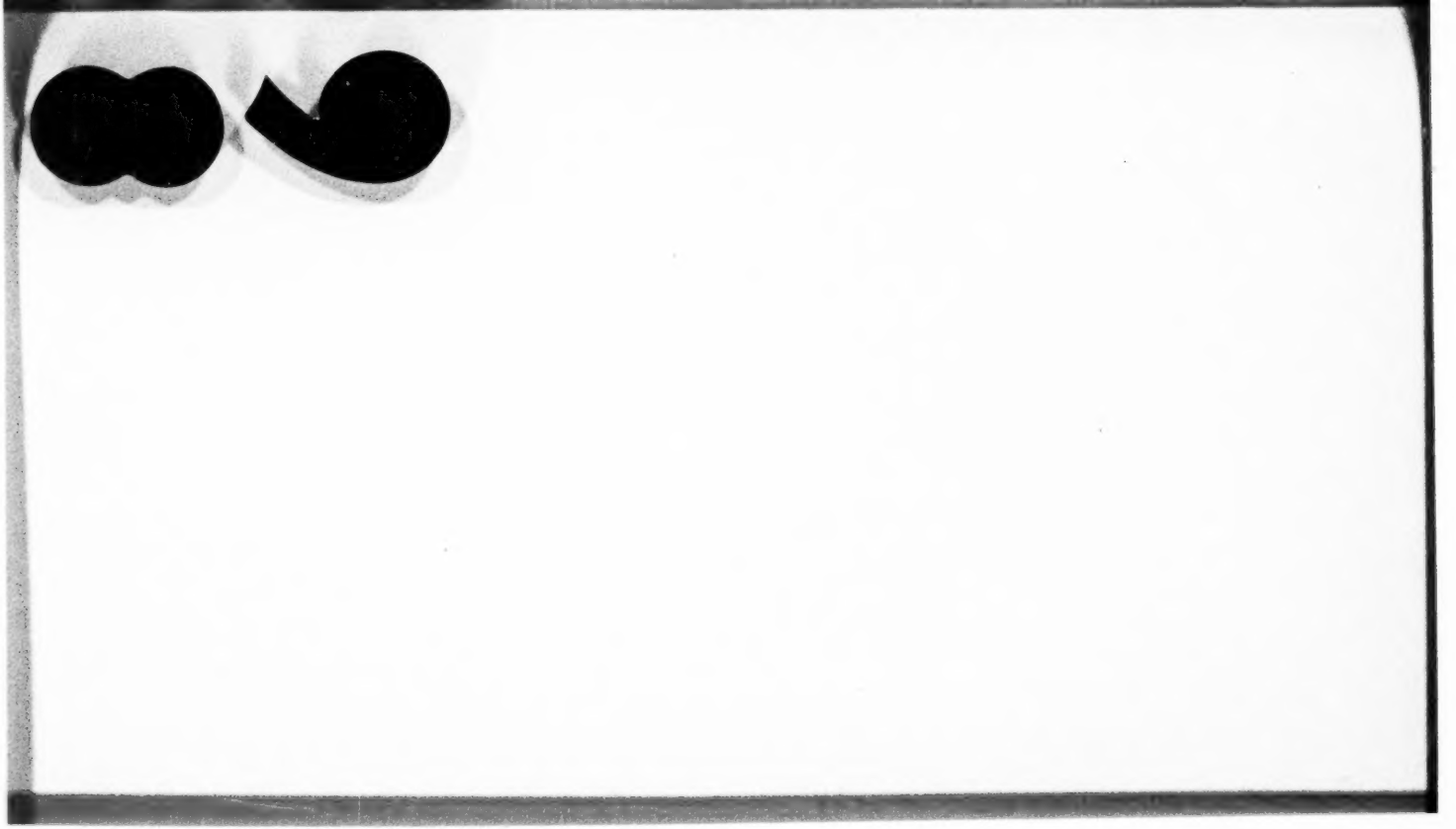
> 'Resolved, That we recognize and proclaim our belief in the free and compulsory education of the children of our nation in public primary schools supported by public taxation, upon which all children shall attend and be instructed in the English language only without regard to race or creed as the only sure foundation for the perpetuation and preservation of our free institutions, guaranteed by the constitution of the United States, and we pledge the efforts of the membership of the order to promote by all lawful means the organization, extension and development to the highest degree of such schools, and to oppose the efforts of any and all who seek to limit, curtail, hinder or destroy the public school system of our land.'

The above resolution was adopted by the Supreme Council, A. & A. S. Rite, for the Southern Jurisdiction of the United States, May, 1920.

Grand Lodge of Oregon, A. F. & A. M., June, 1920.

Imperial Council, A. A. O. Nobles Mystic Shrine, June, 1920."

E N S



MAR 2 1925
WM. R. STARKS

268
35

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 583.

WALTER M. PIERCE, as Governor of the State of Oregon; ISAAC H. VAN WINKLE, as Attorney-General of the State of Oregon, and STANLEY MYERS, as District Attorney, for Multnomah County, State of Oregon,

Appellants,

vs.

THE SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON UNDER SECTION 266 OF THE JUDICIAL CODE.

BRIEF ON BEHALF OF APPELLEE.

WILLIAM D. GUTHRIE,
BERNARD HERSHKOPF,
Of counsel for Appellee.

INDEX.

	PAGE
Statement of facts	3
Preliminary review	13
I. Suit for equitable relief not prematurely brought	26-32
II. Courts of the United States have jurisdiction because a federal constitutional right of plaintiff-appellee was invaded by the enactment in question	32-40
III. The enactment in suit not a legitimate exercise of the police power of the state	41-78
IV. The legislative power of a state in relation to education does not involve the power to prohibit or suppress private schools and colleges	78-86
V. Statute impairs the obligation of the contract embodied in appellee's corporate charter	87-89
Conclusion	89

TABLE OF CASES CITED

PAGE

Abrams *v.* United States, 250 U. S. at p. 630 82

Adams *v.* Tanner, 244 U. S. 590, 592-5, 597-616 48, 49-50, 80

Adkins *v.* Children's Hospital, 261 U. S. 525 44

Bartels *v.* Iowa, 262 U. S. 404 83, 85

Berea College *v.* Kentucky, 211 U. S. 45, 67 88, 89

Buchanan *v.* Warley, 245 U. S. 60 83

Chicago & N. W. Ry. Co. *v.* Dey, 35 Fed. 866, 880 34

Child Labor Tax Case, 259 U. S. 20, 37 9, 21, 42

Collins *v.* New Hampshire, 171 U. S. 30, 33-4 9

Columbia Trust Co. *v.* Lincoln Institute, 138 Ky. 804, 812-4 56

Coppage *v.* Kansas, 236 U. S. 1, 10, 14 72

Crane *v.* New York, 239 U. S. 195 84

Dartmouth College Case, 4 Wheat. 518 87

Gilbert *v.* Minnesota, 254 U. S. 325 47

Green *v.* Frazier, 253 U. S. 233 80

Hamilton *v.* Vaughan, 179 N. W. 553, 558 (Mich.) 56

Hammer *v.* Dagenhart, 247 U. S. 251, 275 8

Heim *v.* McCall, 239 U. S. 175 84

Holy Trinity Church *v.* United States, 143 U. S. 457, 465, 468, 470 19

International News Service *v.* Associated Press, 248 U. S. 215, 236 26

Kennington *v.* Palmer, 255 U. S. 100, 101 29

Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358, 366 83

Lehmann *v.* Board of Accountancy, 263 U. S. 394, 398 47

Liggett *v.* Ladd, 17 Ore. 89, 94 73, 88

PAGE

Lornsten *v.* Union Fishermen's Co., 71 Ore. 540 88

Los Angeles *v.* Los Angeles Gas & Electric Corp., 251 U. S. 32, 38 79

Meyer *v.* Nebraska, 262 U. S. 390, 398, 399 *et seq.* 37, 48, 50, 51-55, 56, 59, 70, 78, 83

Milwaukee Industrial School *v.* Superiors, 40 Wis. 328, 332 74, 75

Nebraska District of Evangelical Lutheran Synod *v.* McKelvie, 262 U. S. 404, 409, 410, 411 35, 36, 48, 55, 56

Packard *v.* Banton, 264 U. S. 140, 143 35

People *v.* American Socialist Society, 202 N. Y. App. Div. 640 47

People *v.* Gillson, 109 N. Y., 389, 398-9 72

People *v.* Turner, 55 Ill. 280 74, 75

School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94, 110 28

Smith *v.* Texas, 233 U. S. 630, 636 72

Society of Sisters of the Holy Names, etc. *v.* Pierce, 296 Fed. 928, 931-3, 933-5, 936, 938 29-32, 39, 42, 60

Springhead Spinning Co. *v.* Riley, L. R. 6 Eq. 551, 558 26

State *ex rel.* Kelley *v.* Ferguson, 95 Neb. 63, 73-4 58

State *ex rel.* Sheibley *v.* School District, 31 Neb. 552, 556 74

Taylor & Marshall *v.* Beckham (No. 1), 178 U. S. 548, 602-3 71

Terrace *v.* Thompson, 263 U. S. 197, 214, 215-6 28, 35, 37

Tillman *v.* Tillman, 26 L. R. A. (n. s.) 781, 785, *et seq.* (S. Car.) 66, 72

Truax *v.* Corrigan, 257 U. S. at p. 344 82

Truax *v.* Raich, 239 U. S. 33, 38 35

Trustees *v.* People, 87 Ill. 303 74

	PAGE
Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65, 82	26
Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 12	28
Waugh *v.* Mississippi University, 237 U. S. 589	84
Wolff Co. *v.* Industrial Court, 262 U. S. 522, 534	44, 72

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 583.

WALTER M. PIERCE, as Governor of the State of Oregon, ISAAC H. VAN WINKLE, as Attorney General of the State of Oregon, and STANLEY MYERS, as District Attorney for Multnomah County, State of Oregon,

Appellants,

vs.

THE SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON UNDER SECTION 266 OF THE JUDICIAL CODE.

BRIEF ON BEHALF OF THE APPELLEE.

The above entitled cause comes before the court upon the appeal of the Governor, the Attorney General and the District Attorney, the law-enforcing officers of the State of Oregon and of Multnomah County therein, from an order of the United States District Court for the District of Oregon awarding the plaintiff an interlocutory injunction against the enforcement of the so-called Oregon Compulsory Education Law enacted by the voters of the

state under an Initiative Petition, November 7, 1922, upon the ground that its provisions were in conflict with the Constitution of the United States, and hence void (record, p. 30*). The case was heard at Portland, Oregon, by the statutory court constituted under the provisions of section 266 of The Judicial Code (36 Stat. 1162) composed of United States Circuit Judge Gilbert and District Judges Wolverton and Bean, and was decided on March 31, 1924, in favor of the plaintiff below, appellee in this court. The unanimous opinion of the court below, delivered by District Judge Wolverton, is printed at p. 20 of the record and will be found reported in 296 Fed. 928.

The enactment in question is printed in full in appendix I to this brief, which has been printed separately for convenience of reference. Briefly summarized, this enactment requires every child between the ages of eight and sixteen, with inconsequential exceptions, to attend the public schools. It is not a compulsory education law in the ordinary sense; such a law has long been in force in Oregon and the validity of compulsory school laws was not and is not challenged in the case at bar. The statute is, in intent and effect, an act to abolish private and parochial schools which give elementary or primary education to children by compelling parents to send their children to the public school. The act proscribes private and parochial schools by denouncing as guilty of a misdemeanor all parents, guardians and custodians who fail to send their children to a public school and by punishing

---

* The page references are to the record unless otherwise indicated.

violation of this requirement with fine and imprisonment. "Each day's failure to send such a child to a public school", the enactment declares, "shall constitute a separate offense". The existence of such an enactment, containing penalties plainly intended to operate *in terrorem*, coupled with the actual threat of the defendants to enforce it as a valid law in September, 1926, when the statute declares it shall become effective, has already caused the plaintiff, which owns and conducts private and parochial schools and maintains an orphanage in the State of Oregon, to lose custom and suffer depreciation in the value of its property and in the good-will which it has built up by over forty-four years of service. Since the enactment practically decreed the extinction of private schools in Oregon even before 1926, and immediate and irreparable damage was resulting therefrom, the plaintiff Society filed its bill of complaint for the injunctive relief which the court below granted, and the defendants have now appealed to this court from the order granting a preliminary injunction (p. 19).

Statement.

There was no dispute as to the facts duly alleged in the bill of complaint. The defendants presented no proofs of any kind and controverted none of the plaintiff's allegations.

The plaintiff-appellee, the Society of the Sisters of the Holy Names of Jesus and Mary, was incorporated in Oregon on November 11, 1880 (pp. 2, 14-6). It was granted corporate power to educate the young, conduct schools and care for orphans (p. 15), and its income was

to come from that source (pp. 3, 15). For more than forty-four years its property and efforts have been devoted to education, both secular and religious, and to the care of orphan children (pp. 3, 5). It has developed into a large, worthy and profitable institution with a most valuable good-will among Catholic parents and guardians and others having the custody of children (pp. 3-6).

The Society conducts primary or grade schools attended by 1,980 children between the ages of eight and sixteen (p. 3). It also conducts high schools and junior colleges (pp. 3-5). In the ordinary course of events, many of the children educated in its primary or grade schools graduate into its high schools and thence in time into its junior colleges (p. 5). The primary or grade schools are not only the most profitable part of the appellee's educational system, but the very heart of its existence, its work and its service (p. 5). Without them the appellee would have practically no source of supply for its high schools and junior colleges (*id.*). Parents and guardians entering their children in the first primary grade, do so with the expectation on their part and that of the school that the children will progress from class to class without the dislocating effect involved in a transfer to other and different schools. The courses of study, both temporal and religious, likewise contemplate this continuity of educational training and discipline under the appellee's charge (p. 10).

The primary or grade schools conducted by the Society for children between eight and sixteen years of age are of the same character, so far as ordinary educa-

tion is concerned, as the corresponding public schools in Oregon (pp. 4-5). The same subjects are taught therein, the same standards maintained, and the same pedagogic methods employed (*id.*). Over all these features the state exercises, and long has exercised, some supervision and control; and there is not a scintilla of proof and no suggestion was made in the court below to warrant any contention or pretense that either this appellee, or any other private or parochial school in the state, has ever been found by the state to be deficient or delinquent in any respect whatever or to have taught objectionable or prejudicial subjects or unpatriotic doctrines.

In addition to education in the common branches, the appellee provides systematic religious instruction and moral training in accordance with the doctrines and moral teachings of the Roman Catholic Church (p. 5). It is alleged in the bill and was not controverted below that (p. 5)—

> "It is the conscientious belief and conviction of parents and guardians in the State of Oregon who are patrons of the plaintiff's said schools, that such religious instruction and moral training are essential to the moral and spiritual welfare of their children and wards, and to a proper preparation for the duties and responsibilities of life and good citizenship, and are most essential for such children and wards when they are between the ages of eight and sixteen years, and while they are in the eight primary grades. By reason of such belief and conviction plaintiff has acquired an assured and increasing patronage for its said grade schools and other schools."

The following table* will show the educational importance which the appellee has attained, undoubtedly be-

---

* Derived from pp. 3-4 of the bill of complaint.

cause of its many years of efficient and satisfactory service as an educational, moral and religious force in Oregon:

Schools	*No. of children between 8 and 16 in primary grades*	*Value of buildings*	*Part used by grade school*	*Value of equipment used by grade school*
1. St. Mary's Academy at Portland.....	130	$100,000	One-third	$15,000
2. St. Francis School at Portland.....	150	20,000	All	5,000
3. St. Mary's Academy at Medford.....	115	75,000	One-half	4,000
4. Sacred Heart Academy at Salem.....	170	50,000	One-half	5,000
5. St. Mary's Academy at The Dalles.....	200	50,000	One-half	5,000
6. The Orphanage in Clackamas County	100	300,000	All used for grade school for orphans	3,000
7. Parochial grade school at Eugene 8. Five parochial grade schools in Portland	1,115	Not owned by appellee	All	
Total 12	1,980	$595,000		$37,000

The annual income derived by the appellee from its primary or grade schools has heretofore been in excess of $30,000 (pp. 5-6).

It must be manifest that the appellee Society has a most valuable business. Moreover, it should be borne in

mind that its buildings, worth nearly $600,000, are constructed and appointed so as to have small value for anything but school purposes, that the cost of altering and remodeling them for any other use would be prohibitive (p. 6), and that the equipment in the primary or grade schools, worth nearly $40,000, would be a total loss if the primary schools were to be discontinued (*id.*).

The latest report of the State Superintendent of Public Instruction (1924) shows that 175,510 children were attending the public schools of the state and only ~~5,904~~ 1,2, were then attending private schools. The Superintendent's census report, in 1920, showed that 148,412 children were then attending public schools and 8,477 children attending private schools, and that of these 156,889 children, between the ages of 5 and 20 years, only 3,170 were foreign-born and 30,800 native-born of foreign or partly foreign parentage. Thus, if we assumed *arguendo* that all foreign-born children were attending the private or parochial schools of the state in 1920, when the latest census was taken—which would be quite an extravagant assumption—the foreign-born children would only represent 2 per cent. of the children attending school in that state.

On November 7, 1922, the voters of the State of Oregon, acting under the initiative provisions of the state constitution and laws, adopted the enactment challenged in the case at bar, which in part provides that—

> "Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in

> which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense."

The punishment prescribed was fine, or imprisonment, or both. The only exceptions made in the act were as to (a) abnormal, subnormal, or physically unfit children, (b) children who had completed the eighth grade, that is, primary school education, (c) children residing at specified and comparatively considerable distances from a public school, and (d) children being taught by parents or private tutors. In the last mentioned case, however, the parent or private tutor must obtain a certificate from the county superintendent of education and the child must be periodically examined, etc.

The exceptions are, consequently, of no practical importance. In substance and effect, the law requires every child between eight and sixteen years of age to be sent to a public school. It is, therefore, in necessary and intended effect, an absolute prohibition of private and parochial schools such as the appellee Society conducts and such as normal children between the ages in question have been permitted to attend from the very beginning of our Governments, and even long prior thereto. The validity of this statute must, of course, be judged by its natural and reasonable effect, whatever pretenses may be ventured. *Hammer* v. *Dagenhart*, 247 U. S. 251, 275. "The direct and necessary result of a statute must be taken into consideration when deciding as to its

validity, even if that result is not in so many words either enacted or distinctly provided for. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." *Collins* v. *New Hampshire*, 171 U. S. 30, 33-4. See also *Child Labor Tax Case*, 259 U. S. 20, 37.

This is peculiarly and essentially true of the enactment now before the court. It is wholly prohibitory, and it does not even purport to regulate private or parochial schools. Indeed, the laws of Oregon already provided and still provide (see appendix I) for regulation, inspection and supervision by the state of these private or parochial schools and for adequate instruction in patriotism and civic duties. No matter how excellent and worthy the proscribed schools may be, this statute, nevertheless, practically decrees their suppression. The right of the parent to choose for his child a private or parochial school which will educate such child in the light of his own religion, or secure for the child special training in particular studies, or develop a particular aptitude, or cure a particular deficiency; the right of the child to influence its parents to the choice of a school which it instinctively prefers or desires; the right of the schools and their teachers to carry on a legitimate and lawful calling and to practise a time-honored, beneficent and noble profession,—all these vital and fundamental rights are invaded and menaced with practical destruction by this enactment.

The enactment further declares that it "shall take effect and be and remain in force from and after the

first day of September, 1926." The purpose of this provision was apparently two-fold: (1) it was intended to afford the state an opportunity to erect the new schools, engage the additional teachers and staff and provide the additional equipment which would be needed, if the many thousand children in the private and parochial schools of the state were to be taken into the public school system; and, on the other hand, (2) to enable the private and parochial schools to wind up their business and liquidate their property and affairs before the act and its destructive provisions became effective. Manifestly, in both aspects, the enactment, even though not directly operative until 1926, commenced at once to exercise its plainly foreseen, intended and natural influence and effect. Its contemplated consequences immediately became operative. To the state, the statute was a mandate forthwith to enter upon its preparations: that is to say, to tax, to spend, to contract, to build, to engage or train additional teachers. To the schools affected, the statute was a peremptory direction to make themselves ready for their doom, to reduce the number of their pupils, to send them to other schools, to discharge teachers, to dispose of property and supplies, to cancel contracts and to forbear from making others. To the parents and guardians, the statute declared that private and parochial schools were anathema to the state and their days numbered, that patriotism and civic duty made it fit and proper to withdraw children therefrom at once, and that prudence required their transfer without delay to other schools where they would find a permanent and continuous, and not a precarious and ultimately doomed, system of education.

The precise situation forecast in the preceding paragraph has, in fact, come to pass in Oregon. This is indisputable. The defendants as law-enforcing officers have publicly announced their conviction that the enactment in suit is valid and wise legislation, and they have declared their intention to enforce it to the full (pp. 9-13). That fact and the considerations above noted have led parents and guardians to withdraw their children from the appellee's schools; and it is daily losing pupils whom it would not lose, were it not for the existence and menace or coercion of this statute and the attitude of the defendants (*id.*). The appellee's income, its good-will and the value of its business and property are, therefore, steadily declining (p. 11). Again, the due conduct of the appellee's business demands that its contracts with teachers and parents and for supplies should be made long beforehand (pp. 11-2). But this enactment rendered it unsafe for the appellee to enter into any such engagements (p. 12). The appellee must also borrow money from time to time for its business purposes (*id.*). The enactment has, however, so depreciated the value of its assets and beclouded its prospects and credit that money lenders will not make it the requisite advances (*id.*).

Reference to appendix II to this brief will show that all the states have compulsory school laws and that all such laws, except the enactment in Oregon in 1922, provide that attendance at a school other than a public school shall under prescribed conditions be compliance with the law. There are many parochial schools in the United States maintained alike by Catholics and Protestants and

some maintained by Jews. The statutes of 24 states expressly provide that attendance at a parochial school shall constitute a proper substitute for attendance at a public school, viz.: Alabama, Arizona, Arkansas, Colorado, Idaho, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, New York, North Dakota, Ohio, Oregon (section 5259 of the Oregon Laws as now in force), South Carolina, Tennessee, Texas, Virginia, West Virginia, Wisconsin and Wyoming. The school statutes of the remaining states impliedly approve parochial schools under the designation of private school, denominational school, or other term. In this way freedom of education in private or parochial or other religious schools is now and has been recognized by all the states in the Union.

In addition, as appendix II further shows, the education laws of the various states provide for varying degrees of regulation and control by the state of private schools, their several curricula and teachers. Provision has, for example, been made that representatives of the state shall inspect private schools, that their standing under the compulsory school laws and otherwise shall depend upon approval by the state authorities, that general standards laid down by the state authorities shall control the curriculum of the private school, that certain subjects inculcating patriotism shall be taught, such as courses relating to the Constitution, civic duties, etc., that elementary courses shall be conducted in English, that the flag shall be displayed about the school-house, that teachers in private schools shall obtain certificates from the state and be required to be citizens of the United

States or to take the oath of allegiance, that private schools shall furnish reports and statistical data to the state authorities in connection with the compulsory school laws and otherwise, that private schools shall be subject to state regulation as to medical, health and sanitary matters, and that no doctrine subversive of the authority of the state shall be taught in private schools. In New York, *e. g.*, no license can be granted to a private school teaching "the doctrine that organized governments shall be overthrown by force," etc. (Laws 1921, ch. 667.) These statutory provisions show how far the control of the state over private education may reasonably extend and how unnecessary it is to suppress all private and parochial schools in order to insure unobjectionable methods of teaching and courses of study, or the inculcation of patriotism in the minds of American children. In appendix I will be found the laws of Oregon in these respects.

PRELIMINARY REVIEW.

The appellee above named, The Society of the Sisters of the Holy Names of Jesus and Mary, is a branch of a large Catholic teaching order of women who dedicate their lives to the education of children. The Society was founded in 1844 in the Province of Quebec, Canada; and in October, 1859, at the request of Bishop Blanchet, famous for his missionary and educational work in the Northwest and among the Indians, twelve of these Sisters came to Portland, Oregon, after a journey by way of the Isthmus of Panama. These Sisters at once estab-

lished St. Mary's Academy in Portland, which has attained high national repute as an educational institution. They were followed in 1863 by twelve additional Sisters, and an academy and school were then established at Salem, the capital of the state, and other schools were soon afterwards opened in other places throughout the state. The legislature of the State of Oregon chartered St. Mary's Academy in 1866, and the Sisterhood was duly incorporated in 1880 (record, pp. 2, 14-16), as above stated. The Society as so incorporated has ever since and for more than forty-four years been duly conducting academies and schools in the State of Oregon for the education of youth. There are now 1284 of these Sisters throughout the United States consecrating themselves to the holy task of teaching children, with 49 schools and 10,461 pupils.

Catholic education in the State of Oregon steadily developed, and other teaching sisterhoods were from time to time established there. In 1907 the Catholic school system received recognition from the legislature of the state (Laws 1907, ch. 129; appendix I), and in 1910 the school laws were amended so as to give a representative of the Catholic Educational Association of Oregon a place on the State Board of Standardization (Laws 1911, ch. 58, sec. 12; Oregon Laws, sec. 4950; appendix I). These statutory provisions are still in force and effect. Moreover, since 1889, when the first compulsory education law was enacted in Oregon, the laws of the state have recognized education in parochial or other private schools as the equivalent of, and an acceptable substitution for, public school attendance (appendix I).

At the present time, the Society maintains in the State of Oregon sixteen elementary schools, eight secondary or preparatory schools and one college, making a total of twenty-five educational institutions, having 96 teaching Sisters and instructing 2,636 pupils. In 1922, the Catholic elementary schools in Oregon, including those of this appellee, numbered 58, with 8,019 pupils, and the Catholic secondary schools 23 with 1,231 pupils, making a total of 9,250 pupils, mostly between the ages of eight and sixteen, with 339 teaching Sisters.

The history of the service rendered to education on this continent by Catholic religious teaching orders, both men and women, following in the footsteps of heroic missionaries, is most inspiring. It begins early in the XVIth century, and continues in an unbroken and constantly increasing line of noble service and beneficent fruits until our own time. This history will be found in many historical works by those desirous of knowing the truth and appreciating the debt which the supremely important subject of education owes to holy men and women who have labored so long and so self-effacingly in this great humanitarian field. Accurate accounts will be found in Burns' "Principles, Origin and Establishment of the Catholic School System in the United States"; in Burns' "Growth and Development of the Catholic School System in the United States"; in "The Catholic Encyclopaedia", under the title "Schools"; and in the library and records of the Division of Statistics, United States Bureau of Education. The necessary limits of a legal brief prevent any full discussion of this most interesting subject.

An illustrative and typical instance of devotion to the noble cause of education will be found in the services rendered by the famous Catholic teaching order of the Ursuline Sisters, who first came to Louisiana in 1727, two centuries ago. They forthwith established a school at New Orleans, and were encouraged in their educational work by the French Government, to which Louisiana then belonged. When the Spanish Government assumed control in 1769, it continued the policy of encouraging education by Catholic teaching orders. But in 1804, Spain having meantime restored Louisiana to France and Napoleon having at once ceded the territory to the United States, the Catholic teaching orders established in Louisiana became apprehensive of threatened confiscation and of hostile or oppressive laws, and they appealed to President Jefferson for protection. Few incidents in the history of education on this continent are more interesting and illuminating. James Madison was then Secretary of State. Under date of July 20, 1804, he wrote to the Superior of the Order of the Ursuline Sisters in New Orleans as follows:

> "I have had the honour to lay before the President your letter of the 14th of December, who views with pleasure the public benefit resulting from the benevolent endeavors of the respectable persons in whose behalf it is written. Be assured that no opportunity will be neglected of manifesting the real interest he takes in promoting the means of affording to the youth of this new portion of the American dominion, a pious and useful education, and of evincing the grateful sentiments due to those of all religious persuasions who so laudably devote themselves in its diffusion. It was under the influence of such feelings that Gov-

> ernor Claiborne had already assured the ladies of this monastery of the entire protection which will be afforded them, after the recent change of Government."

And a month later, on August 22, President Jefferson himself wrote the following letter:

> "I have received, Holy Sisters, the letters you have written to me, wherein you express anxiety for the property vested in your institution by the former Government of Louisiana. The principles of the Government and Constitution of the United States are a sure guaranty to you that it will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to its own voluntary rules, without interference from the civil authority. Whatever diversity of shade may appear in the religious opinions of our fellow-citizens, the charitable objects of your institution cannot be indifferent to any, and its furtherance of the wholesome purposes of society by training up its young members in the way they should go, cannot fail to insure it the patronage of the Government it is under. Be assured it will meet with all the protection my office can give it."

See Fay, History of Education in Louisiana, p. 129; Burns, Principles, Origin and Establishment of the Catholic School System in the United States, p. 83. The teaching orders of the Ursuline Nuns and Ursuline Sisters now number 1,533 in the United States, with 104 schools and 16,427 pupils.

Perhaps nothing could more eloquently show the spirit of tolerance animating the Founders of our National Government and their appreciation of and respect for religion than the above letters. Indeed, even before

the Constitution, the famous Northwest Ordinance of 1787 had proclaimed the spirit and sentiment then prevailing in regard to both education and religion in the following words (appendix I):

> "For extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and Constitutions are erected; . . . It is hereby ordained and declared . . . that the following articles shall be considered as articles of compact between the original states and the people, and states, in the said territory. . . .
>
> "Article I. No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship.
>
> "Article III. Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. . . ."

Nine years later Washington in his immortal Farewell Address declared (Writings of George Washington, vol. 13, p. 307):

> "Of all the dispositions and habits, which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle."

And after the lapse of more than a century and a quarter since Washington's day, his present successor in

the great office of President of the United States has declared with lofty and elevated eloquence—

> "It (the American political system) . . . had its beginning, it found its inspiration, in the religious beliefs of the men who settled our country, made it an independent nation, and established and maintained its Constitution and its laws. If it is to endure, it will be through the support of men of like mind and like character. . . .
>
> "It is altogether natural that those who are connected with religious institutions should be interested in supporting good government. Their interest comes not merely from the ethical teachings of their faith . . . but it comes from a realization that . . . religion has laid the foundation of government. This is preeminently true of our American political system" (Calvin Coolidge, His Ideals of Citizenship, by Edward Elwell Whiting, pp. 268, 283).

Nowhere probably is there a stronger statement of this view than in the leading case of *Holy Trinity Church* v. *United States* (decided in 1892), 143 U. S. 457, 465, 468, 470, where Mr. Justice Brewer, speaking for the unanimous court, among other things proclaimed the historical truth that we are "a religious people":

> "This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. . . .
>
> "If we examine the constitutions of the various States we find in them a constant recognition of religious obligations. Every constitution of every one of the forty-four States contains language which either directly or by clear implication recognizes a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well being of the community. . . .

> "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons: they are organic utterances; they speak the voice of the entire people."

Before entering upon any discussion of the merits, or of the points of constitutional law to be passed upon by this court, it may be of aid if we attempt at the outset to eliminate certain questions of public policy and governmental power of the states in the matter of the education of children which are not involved in the controversy now before the court, and thereby narrow the issue. Thus, there is no challenge whatever by the appellee—

1. As to the power of a state to enact compulsory education laws providing generally that all children shall attend some school, and correlatively as to its obligation and duty, upon making such attendance compulsory, to provide free tuition.

2. Nor as to the power of a state to require under just and equal regulations that teachers shall be competent, of good moral character and patriotic, and that they shall be licensed by state or local authority.

3. Nor as to the power of a state within reasonable and just limits to prescribe particular studies for children, or to prohibit such studies as would be reasonably calculated to be prejudicial to them or prejudicially to affect their morals, religion, or patriotism, but not to prohibit other and proper studies.

It should likewise be emphasized at the outset of the discussion that there was no suggestion below in plead-

ing, brief, or argument that the teachers, men or women, employed by this appellee or in the Catholic parochial or the other private schools of the State of Oregon were not trained and competent scholars, of good moral character and eminently qualified to teach children; nor that there was any ground for doubting their patriotism and loyalty to our national and state governments; nor that the curriculum of these schools or the result obtained therein was in any way unsatisfactory to the state educational authorities, or unequal in educational value or result to that obtained in the public schools; nor that anything taught or inculcated in these schools was inimical to the state, or in any way or sense whatever prejudicial to the morals, patriotism, or welfare of children.

In appendix I to this brief, is the official argument submitted to the people of the state at the election on November 7, 1922, the result of which was that the measure was carried by a vote of 115,506 to 103,685; but in such argument no mention was made of any investigation by any competent or experienced experts, or of any facts tending in the remotest degree to show any necessity whatever for so drastic a measure as the practical suppression of all the private and parochial elementary schools of the state which had for more than sixty years theretofore been not only permitted to teach children but encouraged in that public service.

But in truth, unless court and counsel are to be blind to what "all others can see and understand" * and

---

* *Child Labor Tax Case*, 259 U. S. 20, at p. 37: "How can we properly shut our minds to it?"

what was clearly present in every aspect and phase of this litigation, though direct mention thereof has been studiously avoided, the sole offense of the members of this appellee, The Society of the Sisters of the Holy Names of Jesus and Mary, was that in connection with their schools they were teaching the children and orphans confided to their care the sacred truths and doctrines of religion according to the tenets of the Roman Catholic Church.

Inexcusable and cruel, indeed, is the libel contained in the oblique innuendoes we find in the brief on behalf of the appellant, Governor of Oregon, and particularly the charge at page 62 thereof that injurious effects may result "from the standpoint of American patriotism" if American parents are allowed to guide and determine the character of the education of their own children, and that they may be taught in religious schools disloyal and subversive doctrine and "that the claims upon them of the religion to which they belong are superior to the claims of the United States," etc. The Catholics now appeal from this libel to fair-play and justice and to the judgment of all candid, impartial and tolerant American citizens.

In all Catholic schools, patriotism, obedience to the law and loyalty to the Constitution are taught, not merely as a patriotic duty, but a religious duty as well, and the best and highest ideals of American patriotism and citizenship are exalted. Children are taught in these schools that loyal obedience to the laws and religious tolerance are the two essential elements of good citizenship, and in every way they are impressed with the obli-

gation as a religious duty to render unto Caesar the things which are Caesar's and unto God the things which are God's, and to be ever grateful that in this country these two separate duties are wholly reconcilable.

The fundamental and controlling motive for the establishment and maintenance of Catholic parochial or elementary schools is the profound conviction on the part of Catholics, in which conviction clergy and laity are a unit, that the welfare of the Nation, the stability of our constitutional system of government, the continuance of civil and religious freedom, and the lasting happiness of the individual citizen depend upon the code and standards of morality, discipline, self-control and temperance taught by religion. And this broad-minded view is not confined to Catholics, but is shared by Protestants and Jews throughout our country. The student of history well knows that social order and civilized society have always rested upon religion, that there has never been a civilized nation without religion, that free government has never long endured except in countries where some religious faith has prevailed, and that our own country for three centuries has been an essentially religious country, by which is meant that the majority of citizens have been believers in God and in some religion. When the Constitution of the United States was established, the Americans were a religious people, and as a whole held firmly to one form or another of Christian faith. As was pointed out by Archbishop Ireland in the Cathedral of St. Paul, in those early days, "to stay away from religious service on Sunday was to invoke upon one's self serious public criticism regardless of religious affilia-

tion." It is quite true that the great majority of Americans were then Protestants, but they constituted an essentially religious majority. The Catholics never forget that they owe the blessing of the religious liberty which they now enjoy and which the National Constitution guarantees to a generation that was overwhelmingly Protestant.

Lord Bryce in his great work on "The American Commonwealth"* reviewed the influence of religion in this country, and declared that "one is startled by the thought of what might befall this huge yet delicate fabric of laws and commerce and social institutions were the foundation it has rested upon to crumble away." That foundation he recognized to be religion, and he admonished us that "the more democratic republics become, and the more the masses grow conscious of their own power, the more do they need to live, not only by patriotism, but by reverence and self-control, and the more essential to their well-being are those sources whence reverence and self-control flow." The greatest source of reverence and self-control is to be found in religion, and if we sow in irreligion we shall reap in misery and lawlessness. Hence, the hope and prayer of the Catholic clergy and laity and millions of Protestants and Jews in America that thorough and efficient religious instruction, so far as lies in their power, shall be an essential element in the education of every American child.

The attitude of Catholic parents in regard to their constitutional rights and liberties as American citizens is not at all peculiar or confined to them. Thousands of Protestant and Jewish parents are sending their children

---

* Vol. 2, pp. 793-4, ed. 1914.

to church schools and other private schools, and these parents disapprove and condemn the principle and spirit of the Oregon Compulsory Public School Law just as emphatically as Catholic parents do. There are, for example, many Episcopal church schools, such as Groton, St. Paul's, St. Mark's, etc. The many thousands of Protestant and Jewish parents who now send their children to private church schools where religious instruction is given in the Protestant and Jewish faith respectively resent and protest against the principle of the Oregon Law just as conscientiously and ardently as Catholic parents do, for they readily realize that whilst the Oregon School Law may have been directly aimed at Catholic parochial schools, the precedent is likewise a menace to all other private schools throughout the United States.

LAW POINTS.

I.

SUIT FOR EQUITABLE RELIEF NOT PREMATURELY BROUGHT.

It is confidently submitted that the bill of complaint establishes a case of irreparable injury to the appellee's business and property, and that this injury was already upon it and was steadily growing when suit was brought. *International News Service* v. *Associated Press*, 248 U. S. 215, 236; *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 551, 558. To deny the appellee equitable relief until 1926 would patently be to postpone the remedy until its elementary schools had been practically destroyed, and when it would be too late to undo the damage wrought. "It is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights." *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82. Particularly should that be true where, as here, the defendants are not possessed of means sufficient to answer to the appellee for the injuries done (p. 14).

The defendant officers, the appellants in this court, have, in fact, themselves adopted and acted upon the foregoing views in the case at bar. Heretofore they pre-

sented a motion to this court to advance the cause for early hearing. In urging upon this court the necessity for an early argument of the case at bar, the following were submitted as the principal grounds of their motion (pp. 4-5):

> "That if said statute shall be held by this court to be valid the effect thereof will be to increase the attendance at certain of the grade schools of the State of Oregon, and to require arrangements to be made for additional facilities for the housing and instruction of children who will attend the said schools.
>
> "That the furnishing of said additional facilities will require the expenditure of money for additional construction and equipment and the employment of additional teachers, prior to the first day of September, 1926.
>
> "That in the ordinary course of events a decision of this court in the said cause will not be rendered in time to permit of arrangements for such increased facilities being made after said decision and by the time same will be required, should the said statute be held valid, but that if the said cause may be heard and determined at this term all parties concerned will have notice of said decision in time to make necessary arrangements required thereby prior to said September 1, 1926, or to avoid unnecessary expenditures for said additional facilities should the decision of this court be that said statute is invalid.
>
> "That by reason of uncertainty as to the validity of the said statute, all persons, corporations, associations and others engaged in providing educational facilities, other than public schools, for said children are at a loss to know what preparations to make with reference to the future conduct of said institutions, and that the advancement of the hearing of said cause as herein requested will operate to their material advantage.

> "That the effect of the present uncertainty regarding the validity of said statute is to cause parents, guardians and others having in charge the education of children who are, or will be, affected by the provisions of said statute, to transfer many of such children from private and parochial institutions to the public schools, to the material disadvantage and financial injury of the persons, corporations, etc., owning and conducting such private and parochial institutions and contrary to the wishes of the parents, guardians, etc., of the said children, if the said statute is invalid."

It is, furthermore, alleged in the bill of complaint and not denied that there are about 9,000 children in the private and parochial schools of Oregon; that it would cost not less than $4,000,000 to provide buildings, equipment and teachers for them, if they are to be taken over by the public school system of the state; that it would require months of preparation by the state prior to September, 1926, in order to provide for such pupils, and that the public funds would be wasted if, after they were expended, the enactment of November 7, 1922, were held unconstitutional and void (pp. 12-13).

Manifestly, therefore, it is in the interest of the state itself that a determination of the questions raised in the case at bar should be had as promptly as may be. Otherwise, it must be clear, irreparable damage is threatened, not alone to the appellee, but to the state as well. And there is no remedy whatever at law for the situation. It follows, consequently, that there should be a remedy in equity. *Terrace* v. *Thompson,* 263 U. S. 197, 214; *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, 12; *School of Magnetic Healing* v. *McAnnulty,* 187 U. S.

94, 110; *Kennington* v. *Palmer*, 255 U. S. 100, 101, and the cases there cited.

The learned court below wrote as follows upon this point of equity jurisdiction (pp. 24-5; 296 Fed. at pp. 933-5):

> "One of the searching questions involved by the controversy is whether the causes have been prematurely brought. It will be noted that the act complained against is to become effective on and after the 1st day of September, 1926, more than 2 years and 5 months hence. This presents one of the elements which must be considered, along with the rest, for ascertaining and determining whether, under the showing made, the complainants, or either of them, are meeting with irreparable and irremediable injury, which may not be as speedily and adequately met by such remedies as the law side of the court may afford. The principle that the remedy at law, if relied upon to supplant the equitable jurisdiction, must not only be plain, speedy, and adequate, but as adequate, complete, practical, and efficient to meet the ends of justice as that in equity, is so well settled as to need no citation of authority. See, however, *Terrace* v. *Thompson* [263 U. S. 197].
>
> "It is at once obvious that, in the very nature of the upbuilding and maintenance of parochial and private schools, when the attendance, prospective as well as acquired, is taken away or rendered unlawful, it will destroy the pursuit or occupation. If school buildings have been constructed, and equipment purchased and provided, without school attendance such property must lapse into disuse, and become of no value for the purposes for which it was designed, and, of course, an irreparable loss will ensue—the paramount loss of school attendance, and a damage and practical destruction, especially for school purposes, of the school property.

"Now, although the time at which the act is to become effective is somewhat remote, it is quite apparent, from the allegations of the bills, the work of destruction of complainants' occupation has already set in. They are losing their patronage, traceable directly to the fact that the act is a statute duly adopted and promulgated. Parents are looking to the future, and are laying their plans to meet the exigencies to arise. The curriculum of the grade schools requires several years of attendance, and, if parents must, on the taking effect of the statute, send to the public schools, many of them are prepared to do so now, or as convenience may suggest. Hence the drawing away of complainants' patronage has set in, and will continue with increased progression until the day when all will be lost. This is not only the alleged result of the passage of the act, but it is the most natural and consequential thing to expect. The damage, of course, is irreparable, and compensation does not afford adequate relief. The injury being of a quality that is continuous and accelerating, it must be stayed if the ends of justice are to be met.

"Nor is it an answer to the dilemma that the act may be repealed before it becomes operative, or that ample opportunity is afforded for the people or the Legislature to amend it, so as to present a radically different question from that now involved. In all probability its provisions will remain as they now are until they become operative and the damage is done, for it is not usual to amend or repeal statutes, at least until their effect has been tested. The very purpose of placing the effective date so far ahead was to give ample time for the parochial and private schools to adjust themselves to the new conditions, which is really a confession on the part of the law givers that such schools are going to be hurt, and that seriously, if not irreparably. It must be true, as expressed by Mr. Justice Brewer while sitting in the Circuit Court of Nebraska:

" 'That the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand'—quoted in *Toledo, A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.* (C. C.) 54 Fed. 746, 751.

"That the writ may be novel, or is without precedent, is not a fatal objection to its use, for the jurisdiction of a court of equity depends—'rather upon the necessities of mankind, and the great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages, and all people.' *Dodge* v. *Cole,* 97 Ill. 338, 364.

" 'Courts may amplify remedies and apply rules and general principles for the advancement of substantial justice.' 32 Corpus Juris, p. 34, §13.

"Of course, in the use of the writ of injunction, the court must exercise a sound and legal discretion, regulated by analogy, and by what would be manifestly just, in view of all the existing conditions.

"It cannot be questioned that a party affected by an unconstitutional act need not wait until some step is taken, under the act, that would affect him injuriously. 'One does not have to await the consummation of threatened injury to obtain preventive relief.' *Pennsylvania* v. *West Virginia,* 262 U. S. 553. See, also, *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U. S. 65. . . .

"The case of *Terrace* v. *Thompson, supra,* is one where, though the act was effective, there was no violation thereof by the parties concerned. Yet a suit to enjoin its enforcement was sustained, on the ground that a violation of the act would subject the offenders to the penalty subjoined. Nor are we without precedent for the application of injunctive relief, even prior to the time when the statute becomes effective. *Palatka Waterworks* v.

City of Palatka (C. C.) 127 Fed. 161. And *Davenport* v. *Kleinschmidt,* 6 Mont. 502, seems to be of like character.

"However, considering that injunctive relief is appropriate to prevent threatened or impending irreparable injury and damage to one's property rights, it can hardly be further urged that it is inapplicable here because the suits were prematurely instituted. The present bills of complaint show, not only a threat to enforce the act when it becomes effective, but that complainants are suffering irremediable injury now, which will continue with increasing detriment and damage until their principal occupations are destroyed and they are deprived of their property and property rights. We think the suits were not prematurely brought."

II.

COURTS OF THE UNITED STATES HAVE JURISDICTION BECAUSE A FEDERAL CONSTITUTIONAL RIGHT OF THE PLAINTIFF-APPELLEE WAS INVADED BY THE ENACTMENT IN QUESTION.

As the court will observe from the portion of the enactment of November 7, 1922, quoted above, its sanctions fall upon the parents and guardians who fail to send their children to the public schools and likewise upon any "other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over." It is true that the penalties expressed in the statute do not, in terms at least, run against the private or parochial schools which may receive children between eight and sixteen years of age as pupils in violation of the act.

Whether such schools would not, in such circumstances, be aiders and abettors of the parents and guardians themselves, and thus under settled rules of criminal law equally guilty as principals of the offense and misdemeanor, need not be debated here. The fact that the harm threatened by the enactment is directly incident upon the appellee's schools can readily be established, even upon the assumption indulged by the defendants themselves that the statute does not at all proscribe the appellee's schools as guilty of crime thereunder. Moreover, this appellee comes literally within the law because it maintains an orphanage, and therefore has immediate "control or charge or custody" of 100 orphan children "whose only home is in said institution" (p. 4).

If it be conceded *arguendo* that the threat of the statute is in terms limited to the parent, guardian, or custodian alone, it must still be manifest that its direct and necessary effect is to work irreparable injury to the private and parochial schools of the state. Such schools plainly cannot exist after parents, guardians and custodians are forbidden by law to send children thereto under penalty of criminal prosecution. Without pupils, there can obviously be no schools; and, unless parents and those having children in their custody may lawfully permit children to attend the private or parochial schools, the latter will, of course, have no pupils.

It is, therefore, clearly an untenable contention on the part of these appellants that the enactment challenged does not directly, immediately and necessarily damage the appellee's schools and orphanage, nor invade any of its rights, even if the statute be unconstitutional

so far as parents, guardians or other custodians of children are concerned. The liberty and freedom of the parents and guardians lies at the very basis of the appellee's property rights. If parents and guardians are not free to patronize the appellee's schools, the Society must abandon its beneficent and fruitful work; its valuable business must be destroyed; its good-will must be dissipated, and its right to pursue its noble calling must fail and come to an end. "You take my house, when you do take the prop that doth sustain my house; you take my life, when you do take the means whereby I live." *

Surely, no one would for a moment doubt that a railroad was directly and injuriously affected by a law which attempted to prohibit persons from riding on its lines. No court would for a minute tolerate the preposterous plea that such a statute concerned only the liberty of the individuals prohibited and did not directly or necessarily affect the railroad corporation in any such practical degree as would permit it to contest the constitutional validity of such a statute before a court of justice.

Constitutional rights are not held by so visionary or tenuous a thread. To cut off one's custom at the very root, to wipe out his source of living or supply by an unconstitutional threat to all those with whom he deals, and then to assert that neither his property rights nor his liberty is invaded thereby, "is the very irony of despotism. Apples of Sodom were fruit of joy in comparison." Brewer, J., in *Chicago & N. W. Ry. Co.* v. *Dey*, 35 Fed. 866, 880. The Constitution looks to the substance

---

* Merchant of Venice, Act IV, sc. II, l. 375.

of things; and no amount of sophistry can alter the fact that in the case at bar the freedom of the parents, guardians and custodians to send their children to private or parochial schools is, in the strictest and elementary sense, of the very essence of the property rights of the appellee Society. If, therefore, the liberty of parents be unconstitutionally impaired by the enactment in suit, surely it must needs follow, by the same token and with irresistible logic, that the constitutional rights of the appellee are likewise directly and unconstitutionally abridged.

It is, perhaps, quite unnecessary to remark that the foregoing plain dictates of common sense have repeatedly had the approval of this court. *Truax* v. *Raich,* 239 U. S. 33, 38; *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 262 U. S. 404; *Terrace* v. *Thompson,* 263 U. S. 197, 215-6; *Packard* v. *Banton,* 264 U. S. 140, 143. In *Truax* v. *Raich, supra,* a statute of Arizona prohibited employers from having more than twenty per cent of aliens in their employ. The penalty prescribed in the act ran against the employer alone, and the act was not in terms addressed to the alien at all. Raich was an alien in the employ of Truax. The latter was in all respects satisfied with Raich and his work. Nevertheless, he advised Raich that the statute in question and the penalties which it denounced made it necessary for him to discharge Raich. Thereupon Raich applied to a court of the United States for an injunction to restrain the Attorney General of Arizona from enforcing the enactment upon the ground that it was unconsti-

tutional. Precisely as in the case at bar, it was there argued that Raich had no right to complain merely because his employer's rights were invaded by the act, that the statute was not directly applicable to him, and that hence no constitutional question affecting Raich himself was in fact before the court. This court, however, refused to approve any such specious argument, Mr. Justice Hughes saying (239 U. S. at p. 38):

> "It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe* v. *Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151, 162); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employes to bring the alien quota within the prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had."

In *Nebraska District of Evangelical Lutheran Synod of Missouri* v. *McKelvie*, 262 U. S. 404, 409, the statute forbade teachers to give instruction in a foreign language. The sanction denounced by the statute fell solely upon teachers. As here, it did not purport to address itself to the school. It will be noted that in that case the plaintiff was a corporation conducting a private or parochial school.

The arguments now pressed by the defendants in the case at bar were, consequently, in all respects peculiarly applicable to the plaintiff, the Evangelical Lutheran Synod. With equal force and appropriateness, it could there be urged that, as the plaintiff was a corporation, it could not claim a violation of liberty under the Fourteenth Amendment, on the notion that the liberty protected by the Amendment is that of natural persons exclusively, that the plaintiff corporation could not raise any question affecting the liberty or property rights of its teachers, since they alone could be heard to complain of a violation of their rights, and that as the prohibitions of the statute were not aimed at it, none of its rights was directly transgressed by the law. Hence, it is particularly noteworthy that the situation before the court in the case of the Evangelical Lutheran Synod was precisely the same as that now presented by the appellee Society. Nevertheless, this court then held that the plaintiff corporation was entitled to seek an injunction against the law-enforcing officer of Nebraska; and, as the court in *Meyer* v. *Nebraska*, 262 U. S. 390, had already pronounced the so-called "Foreign Language Act" unconstitutional, it granted the Evangelical Lutheran Synod the injunctive relief it prayed for. 262 U. S. at p. 411.

Terrace v. *Thompson*, 263 U. S. 197, 215, also strikingly illustrates the same rule. The statute of Washington there involved rendered unlawful the holding of agricultural land by aliens. Terrace, who owned such land, desired to lease it to a Japanese subject, one Nakatsuka, but feared to do so because of the existence of

the statute. Thereupon he sued the Attorney General of Washington to enjoin the enforcement of the act as unconstitutional. The jurisdiction of the court was challenged by the defendant. The court, however, overruled that objection, Mr. Justice Butler declaring (at p. 215):

> "If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as practical, efficient or adequate as the remedy in equity. And assuming, as suggested by the Attorney General, that after the making of the lease the validity of the law might be determined in proceedings to declare a forfeiture of the property to the State or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. No action at law can be initiated against them until after the consummation of the proposed lease. The threatened enforcement of a law deters them. In order to obtain a remedy at law, the owners, even if they would take the risk of fine, imprisonment and loss of property, must continue to suffer deprivation of their right to dispose of or lease their land to any such alien until one is found who will join them in violating the terms of the enactment and take the risk of forfeiture. Similarly Nakatsuka must continue to be deprived of his right to follow his occupation as farmer until a land owner is found who is willing to make a forbidden transfer of land and take the risk of punishment. *The owners have an interest in the freedom of the alien, and he has an*

> *interest in their freedom, to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the Attorney General to enforce the punishments and forfeiture prescribed prevent each from dealing with the other. Truax* v. *Raich, supra.* They are not obliged to take the risk of prosecution, fines and imprisonment and loss of property in order to secure an adjudication of their rights. The complaint presents a case in which equitable relief may be had, if the law complained of is shown to be in contravention of the Federal Constitution." (Italics ours.)

For the foregoing reasons, it is submitted that the court below soundly refuted and overruled the defendants' contentions upon this head when it declared as follows (pp. 22-4, 296 Fed. at pp. 931-3):

> "The question as to equitable jurisdiction is a simple one, and it may be affirmed that, without controversy, the jurisdiction of equity to give relief against the violation or infringement of a constitutional right, privilege, or immunity, threatened or active, to the detriment or injury of a complainant, is inherent, unless such party has a plain, speedy, and adequate remedy at law; and in the exercise of such jurisdiction, the court may, in proper cases, restrain state officers, clothed with authority for enforcing the laws, from the threatened enforcement of a state law which contravenes the federal Constitution, wherever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable. . . .
>
> "Further than this, a party insisting that constitutional guaranties for his benefit are being violated, may also insist, as an element of infringement of such guaranties, that others upon whom he is dependent for the support and sustenance of his

lawful business shall not be deprived of their constitutional rights, privileges, and immunities. . . .

"To make the application here, the complainants in the instant cases have an interest in the parents and guardians of children of school age, and in the protection of their constitutional rights and liberties, and such parents and guardians have an interest in the constitutional rights of complainants to see that their schools may be maintained for the mutual use and benefit of the parties concerned. Thus the field of inquiry is broadened, and pertains, not only to whether the complainants' constitutional rights are affected adversely by the act in controversy, but to whether the constitutional rights of the parents and guardians are also adversely affected, for, if they are so affected, complainants will be deprived, nevertheless, of the advantage of patrons with legal right and privilege of providing school attendance. In other words, the schools will be affected adversely, if the act is unconstitutional, whether it be by reason of an invasion of the patrons' constitutional rights and privileges, or of an invasion of plaintiffs' inherent rights, or both. Indeed, the very pith of complainants' contention is that they cannot maintain their schools, if their patronage is taken away by making it unlawful for parents and guardians to send their children to complainants' schools.

"It can scarcely be contended that complainants' right to carry on their schools, whether parochial or private, is not a property right, and the right of parents and guardians to send their children and wards to such schools as they may desire, if not in conflict with lawful requirements, is a privilege they inherently are entitled to enjoy."

III.

THE ENACTMENT IN SUIT IS NOT A LEGITIMATE EXERCISE OF THE POLICE POWER OF THE STATE.

It is a commonplace under our system of constitutional government and constitutional limitations that neither the individual's right of liberty nor his right of property is absolute. Individuals hold even those essential, fundamental and sacred rights subject to the power of the state to abridge them by just and equal laws in order to promote the public safety, health, morals, or general welfare. But this power is not unlimited, and it must be exercised within reasonable and just limits. If the power be arbitrarily, unnecessarily, unreasonably, ruthlessly, or wantonly exerted, the fundamental rights of the individual may be invaded, and the legislation be unconstitutional and void. To the end that the supreme law of the land may be vindicated, its guaranties enforced and all affected duly protected, the courts are entrusted with authority, and it becomes their solemn duty, to review the reasonableness and propriety of any attempted use of the police power of a state. It follows that this court, in the case at bar, must weigh and consider the character, purpose and effect of the enactment challenged in order to determine whether it is, in fact and truth, a reasonable and legitimate exercise of the powers of government, or merely an arbitrary and unreasonable invasion and attempted destruction of essential, fundamental and sacred private rights without any legitimate justification or any necessity in the public welfare.

The inherent and fundamental character of the inquiry thus committed to the court, as we have already seen, requires the court to look at the outset to the actual and practical effect of an enactment. In the case at bar, therefore, the first duty must be to determine the practical and true effect of the statute under consideration and accordingly to determine its character. As Mr. Chief Justice Taft said for the court in the *Child Labor Tax Case, supra,* 259 U. S. 20, 37:

> "In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?"

Courts, of course, do not close their eyes to what everybody knows. Consequently, this court, like the court below, must know and realize that the true purpose and intent of the act, as well as its plain and intended practical effect, were the destruction of private primary, preparatory and parochial schools, for they certainly could not survive the denial of the right of parents to have their children thus educated in the primary grades. The three judges in the court below, sitting in Oregon and presumably thoroughly familiar with local conditions and motives, declared that (p. 27; 296 Fed. at p. 936)—

> "The act could not be more effective for utterly destroying the business and occupation of complainants' schools, except perhaps the college and higher preparatory grades, if it had been entitled 'An Act to prevent parochial and private schools

> from teaching the grammar grades'. This serves to emphasize the seriousness of the controversy. Indeed, the simile is no stronger than the argument for the adoption of the measure put it: 'A divided school can no more succeed than a divided nation'. That such is the purpose of the act is obvious and incontrovertible."

Such drastic and extraordinary legislation is indisputably a portentous innovation in America. Private and religious schools have existed in this country from the earliest times. Indeed, the public or common school, as we know it to-day, dates only from 1840. For generations all Americans—including those who fought for liberty and independence in the eighteenth century, and who drafted the Declaration of Independence, the Northwest Ordinance of 1787, and the Constitution of the United States—were educated in private or religious schools, and mostly the latter. Perhaps no institution is older or a more intimate part of our colonial and national life than religious schools and colleges, both Catholic and Protestant. The private and religious schools have been the laboratories in which educational methods have been worked out and pedagogic progress accomplished from the very beginning of our history. Out of them have developed, or to them is due, our greatest colleges and universities, the most important of them to this day being private or religious institutions. In more recent times commonwealth colleges and universities have grown up. The legislation before the court manifestly carries within itself a threat, not merely to the private elementary and preparatory schools which it now practically proscribes, but to every private or religious pre-

paratory school and every private or religious college or university in the land. If a "divided school can no more succeed than a divided nation", as the proponents and defenders of the act wrote in defense of the challenged measure when it went before the people of Oregon by initiative petition, and thus invoked the destruction of all private and parochial elementary schools, a "divided" high school or college or university would stand upon no more secure footing, and hence the doom of every private or religious institution of higher education is even now forecast and in process, if this Oregon enactment be within the constitutional powers of a state.

A learned commentator upon the police power has admonished us that—

> "Freedom in the pursuit of art, literature and science is, as matter of history, bound up with the freedom of religion and of speech and press, for it has practically never been opposed for other than religious or political motives" (Freund on Police Power, sec. 479).

The statute in suit is so unusual and extraordinary that it must arouse misgivings in the judicial mind upon even the slightest reflection. More than ever must it be borne in mind in judging it, as pointed out by the Chief Justice in *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 534, that—

> "While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances," citing *Adkins* v. *Children's Hospital,* 261 U. S. 525.

In the present case, the statute abridges the freedom of four classes closely interrelated: (1) the freedom of the private and parochial schools, (2) the freedom of teachers engaged in teaching in the private and parochial schools, (3) the freedom of parents and guardians, and (4) the freedom of children. It will, perhaps, make the true issue clear and distinct if these four categories be separately considered.

1. At the outset, it should be clearly understood that the private and parochial schools of Oregon are not in court complaining of any *regulatory* measure, and that they have no quarrel with any proper compulsory education law.

As much as any one, the private and parochial schools desire every child to have an education and a good one. Indeed, to assure such an education is the very reason for the existence of private and parochial schools. They agree unreservedly that, generally speaking, every child should be compelled to attend *some* school. But they insist that it by no means follows that the public welfare, or the interest of the child, requires attendance at a public school exclusively.

There is nothing in the record which warrants even the suggestion that private and parochial schools in Oregon are in any respect inferior to the public schools. No such claim or pretense was made in the argument which the proponents and sponsors of the act addressed to the voters. No such claim or pretense was made in the court below. If, however, the contrary were the fact, the case would still be no different; for there would still not exist any valid reason for the total suppression of the private and parochial elementary schools. The State of

Oregon has regulatory power adequate to every reasonable and proper need in this relation. Indeed, it has largely exercised it as the statutes in appendix I demonstrate. It has power to inspect, supervise and examine the schools, the teachers and the pupils. It has power to prescribe some standards of study and attendance, to prohibit improper teachings and subjects, and to require proper methods and facilities. In fact, there is no abuse, or possibility of abuse, for which the state has not available some perfectly plain and time-honored mode of regulation entirely appropriate to correction or prevention.

In the brief submitted on behalf of the appellant Governor of the State of Oregon, it is urged in justification for the enactment that it was necessary in order to prevent the teaching of disloyalty and subversive radicalism or bolshevism. We lay to one side the utter absence of any basis in fact for such an argument and the offensiveness of the suggestion, as well as the patent incongruity of employing it in support of an effort to destroy such schools as the Hill Military Academy, the plaintiff and appellee in No. 584, whose school, as the record in that case discloses (pp. 2-3), "offers its students instruction in military science and training under the supervision and control of an officer assigned to said school for that purpose by the War Department of the United States".

Assuming, therefore, but only for the purposes of the argument, that there may be in fact such an evil as this appellant conjures up and that it is not a mere chimera, nevertheless, there is no reasonable necessity for any

such prohibitory law as is now under discussion. This court has emphatically held that the states have power to make criminal and forbid the teaching of disloyalty, sedition, or pacifism. *Gilbert* v. *Minnesota,* 254 U. S. 325. It has also declared "that this court and other courts have decided that a license or certificate may be required of a . . . school teacher." *Lehmann* v. *Board of Accountancy,* 263 U. S. 394, 398. It is now indubitable law that a state may require private schools to be licensed and may refuse such licenses to schools which seek to inculcate doctrines inimical to our form of government. *People* v. *American Socialist Society,* 202 N. Y. App. Div. 640. In these unquestionable rules of law clearly repose all the protection and power which the state reasonably requires. It need license only proper and patriotic private schools; it need issue certificates to those teachers only whom it finds of satisfactory character and fitness from every reasonable point of view, including patriotism and loyalty, and it need not permit any others to teach anywhere; and, in addition, it can enact criminal laws for the punishment of all who disobey any just and equal regulatory measure.

In such a system of regulation, there is no element of total and indiscriminate prohibition—no ruthless sacrifice of the innocent and the guilty alike. It is not reasonably necessary to destroy the private and parochial schools conducted by this appellee, which has scrupulously obeyed the law during the more than forty-four years of its existence, and to deprive it of all opportunity hereafter law-abidingly and patriotically to carry on a noble and beneficent calling. Where regulation is so

completely adequate, prohibition is unnecessary and constitutes mere arbitrariness and wanton abuse of power. Particularly must this be true, where the subject of the alleged prohibition is an ordinary, innocuous and useful calling, trade, or business. However the matter may stand as to nuisances and businesses tainted with vicious qualities, tendencies, or effects, there is no doubt that this court has repeatedly and authoritatively refused to countenance destruction of honest and ordinary businesses charged with abuses which were readily remediable by regulation. *Adams* v. *Tanner,* 244 U. S. 590; *Meyer* v. *Nebraska,* 262 U. S. 390; *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie, id.* 404, 410.

In *Adams* v. *Tanner, supra,* an initiative measure of the State of Washington forbade employment agencies to collect pay from employees for whom they secured situations. It was argued that this was not really a prohibitory law, since its effect was merely to require free service to the workman, and there was no prohibition upon collecting compensation from the employer. This court, however, refused to be misled by any such sophistry. It held that the act, in substance and effect, prohibited the ordinary business of finding employment for individuals in return for pay from them.

It was, however, further insisted by the state in that case that such a prohibition was justifiable, because the business of employment agencies was affected by many serious abuses. How plausible and persuasive that contention was can readily be perceived upon perusal of the dissenting opinion of Mr. Justice Brandeis. Nevertheless, this court concluded that even such a showing was

not sufficient justification for the abolition of this ordinary and legitimate business; and the court held that the abuses might afford warrant for due regulation, but not for utter prohibition. Mr. Justice McReynolds then wrote in part as follows (244 U. S. at pp. 592-5):

> "The bill alleges 'that the employment business consists in securing places for persons desiring to work' and unless permitted to collect fees from those asking assistance to such end the business conducted by appellants cannot succeed and must be abandoned. We think this conclusion is obviously true. As paid agents their duty is to find places for their principals. To act in behalf of those seeking workers is another and different service, although, of course, the same individual may be engaged in both. Appellants' occupation as agent for workers cannot exist unless the latter pay for what they receive. To say it is not prohibited because fees may be collected for something done in behalf of other principals is not good reasoning. The statute is one of prohibition, not regulation. . . .
>
> "We have held employment agencies are subject to police regulation and control. 'The general nature of the business is such that unless regulated many persons may be exposed to misfortunes against which the Legislature can properly protect them,' *Brazee* v. *Michigan*, 241 U. S. 340, 343. But we think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living. On the contrary, such service is useful, commendable, and in great demand. . . .
>
> "*Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in*

> *an upright way.* Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked." (Italics ours.)

Meyer v. *Nebraska,* 262 U. S. 390, involved the so-called Foreign Language Law of Nebraska. It prohibited the teaching of a foreign language to children before they had passed through the eighth grade. Meyer had violated this act by teaching German to young children in a parochial school. The act obviously attempted to deprive him of his vocation as a teacher. Many arguments were urged in defense of the statute. Among others, it was argued that the act tended only to regulate the teaching of foreign languages to the young and to postpone that species of education until the child was older and better fitted therefor; that it was calculated to make English the primary and preferential tongue of the children; that it tended to Americanize children of foreign parents; that over 24 per cent. of the men affected by the draft during the late war were found not to know the language of this country; that foreigners and their children lived by themselves in "little Italys, little Germanys and little Polands" and never really became part of this country and its actual citizenship; that such situations were not conducive to patriotism and loyalty, etc.,

etc. That all this had an obvious plausibility, cannot be doubted; indeed, it had theretofore proved conclusive in the state courts.

But this court would have none of it. Quite rightly, it perceived that the means adopted, namely, the prohibition of teaching foreign languages to the young, was not appropriate to any legitimate end. Due regulation could accomplish all that was needful in that relation without the total destruction of an honest calling. The teaching of a foreign tongue was in no sense inherently vicious; nor were those who carried it on as a means of livelihood. Honestly engaged in, there was nothing reprehensible in that species of business or prejudicial to the public welfare. Hence it could not constitutionally be prohibited. Mr. Justice McReynolds, speaking for the court, said in part as follows (262 U. S. at p. 399 *et seq.*):

> "While this court has not attempted to define with exactness the liberty thus guaranteed [*i. e.*, by the Fourteenth Amendment], the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. *Slaughter-House Cases*, 16 Wall. 36; *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Minnesota* v. *Barber*, 136 U. S. 313; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Lochner* v. *New York*, 198 U. S. 45; *Twining* v. *New Jersey*, 211 U. S. 78; *Chicago, B.*

& Q. Ry. Co. v. *McGuire,* 219 U. S. 549; *Truax* v. *Raich,* 239 U. S. 33; *Adams* v. *Tanner,* 244 U. S. 590; *New York L. Ins. Co.* v. *Dodge,* 246 U. S. 357; *Truax* v. *Corrigan,* 257 U. S. 312; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Wyeth* v. *Board of Health,* 200 Mass. 474. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton* v. *Steele,* 152 U. S. 133, 137.

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, 'Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.' Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws.

"Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

"The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the State has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act.' *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 187 N. W. 927. Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

"It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and 'that the English language should be and become the mother tongue of all children reared in this state'. It is also affirmed that the foreign-born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type, and the public safety is imperiled.

"That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by

methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

"For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent • • • The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

"The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquillity has been shown.

> "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the State's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams* v. *Tanner, supra,* p. 594, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State."

The conclusiveness of the foregoing precedent in the case at bar will be even clearer if the decision be read in connection with the companion case of *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 262 U. S. 404, 410, decided at the same time. In that case the Lutheran Synod was, like the plaintiff and appellee in the case at bar, an educational corporation. It was engaged in the business of teaching young children. Among other things, it taught them foreign languages. The law-enforcing officers of the state were threatening to arrest its teachers of foreign languages and thus interfere with its school and business. To prevent that, the Lutheran Synod sued to enjoin the county attorney. Following the ruling that the Nebraska Foreign Language Act was un-

constitutional in the *Meyer* case, *supra,* this court awarded the Lutheran Synod an injunction as prayed. 262 U. S. at p. 411. In other words, the act was in each case held to be void as an unreasonable and arbitrary prohibition of an ordinary and lawful business and calling, regardless of the fact that in the one case the calling or business involved was that of an individual, while in the other it was that of a corporation employing individuals as teachers.

In *Hamilton* v. *Vaughan,* 179 N. W. 553, 558 (Mich.), Mr. Justice Fellows used the following language:

> "Before the business of educating the young in the same courses taught in the public schools, before the business of educating the young in the Christian religion, before the business of conducting these parochial schools can be outlawed and prohibited, their prohibition must bear some reasonable relation to the public good, or the public health, or the public morals, or the public safety, or the public welfare. The right to regulate I concede; the right to prohibit I deny."

The impropriety of such a prohibition has been likewise excellently expressed by the Court of Appeals of Kentucky in the case of *Columbia Trust Co.* v. *Lincoln Institute,* 138 Ky. 804, 812-4. There Chief Justice Barker declared—

> "If the teaching of the young to be useful, upright, Christian citizens is not inimical to the public safety, public morals, or the public health, then it must follow that an act which seeks either to prohibit it altogether, or to authorize others to prohibit it, must be invalid. It is difficult to find language to make plainer that which is so obvious as in the proposition before us. The purposes of the institution under discussion include

the whole circle of the solid virtues with which youth may be endowed. Undoubtedly it is a substantial good to educate the youth of the state; and such is the declared policy of the Constitution. Section 183 provides: 'The general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state.' It cannot, then, be in any way injurious to the public to aid in forwarding the great educational policy which the people themselves have declared in their fundamental law,—the giving of every young man and woman in the commonwealth a sound education. And when academic education is supplemented by religious training and special instruction in the agricultural and mechanical arts and sciences, it seems to us that it is contrary to the most obvious public policy that an institution which affords such an education should be in any way blocked or impeded. What good reason can be given for prohibiting the exercise of such a charity as that which we have under discussion, unless it can be shown that education, supplemented by religious training, may be in some way an evil to society? Does not the mind of every virtuous and right-thinking person at once admit that the contrary is true? Do we not know that religious educational training has a tendency to make men more industrious, more virtuous, and better generally, morally and physically? In other words, better, wiser, and more useful citizens. What would be thought of an act which prohibited the farmer from cultivating a piece of land of greater extent than 75 acres, without the permission of his neighbors? By what argument could an act be supported which prohibited a manufacturer from working more than a given number of artisans? And yet it is seriously contended that a school which seeks to make religious, upright, educated citizens may be prevented under the police power of the state as a public nuisance. Education strengthens the mind,

> purifies the heart, and widens the horizon of thought. It magnifies the domain of hope, multiplies the chances of success in life, and opens wide the door of opportunity to the poor as well as to the rich. It makes men better husbands, better fathers, and better citizens. It is not doubted that the legislature, under the police power, may regulate education in many respects. It may prohibit the mingling of white and colored children in the same schools or in schools of immediate proximity. Perhaps, it may be within the police power to prohibit coeducation of the sexes, or to, in any other reasonable way, regulate the mere manner of educating the youth of the state; but to arbitrarily prohibit education is in direct violation of the Bill of Rights."

2. The statute in suit, it will be recalled, was enacted by the voters of Oregon under an initiative petition. Pursuant to the provisions of section 4103 of the Oregon Laws, the proponents of the measure formulated an argument in support of the bill. The text of their appeal is printed in full in appendix I to this brief. It purports to set forth the reasons for the enactment in suit and the objects or ends sought thereby.

The official argument for the initiative measure commences with an encomium upon the public schools. It is unnecessary to dispute the fact that that system has many and great virtues. Loyalty to it, however, does not call for injustice to private education. In *State ex rel. Kelley* v. *Ferguson,* 95 Neb. 63, 73-4, that aspect was well pointed out as follows:

> "The public school is one of the main bulwarks of our nation, and we would not knowingly do anything to undermine it; but we should be careful to avoid permitting our love for this noble insti-

> tution to cause us to regard it as 'all in all' and destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children. . . . The state is more and more taking hold of the private affairs of individuals and requiring that they conduct their business affairs honestly and with due regard for the public good. All this is commendable and must receive the sanction of every good citizen, but, in this age of agitation, such as the world has never known before, we want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home."

The argument in support of the proposed enactment as officially circulated among the voters of Oregon proceeded as follows (appendix I, p. 24):

> "The assimilation and education of our foreign born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.
>
> "We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.
>
> "Mix the children of the foreign born with the native born, and the rich with the poor. Mix those with prejudice in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American."

That the assimilation of the foreigner is not a justification for any such prohibitory statute as that now before the court, was expressly decided by this court in *Meyer* v. *Nebraska*, 262 U. S. 390, 402. But the fact is

that the whole contention is fallacious and merely a far-fetched extravagance or pretense. So the court below, with intimate knowledge of the precise local situation, held (p. 29; 296 Fed. at p. 938), and such is, indeed, the plain truth.

Oregon has no substantial unnaturalized immigrant problem. Eighty-five per cent of its population is native-born. Half of the remainder is naturalized and presumably Americanized. Of the children of the seven and a half per cent unnaturalized, only a small number attend private schools. The children of poor, ignorant foreigners do not attend private schools where tuition must be paid for; they generally go to the free public schools. Manifestly, therefore, compelling pupils of private and parochial schools to attend public schools, would not substantially increase the number of foreigners' children already in the public schools.

As we have seen above at p. 7, the official statistics for 1924 show that 175,510 children were attending public schools and only 5,994 private schools. Even if the latter were all foreigners or of foreign parentage—which is, of course, an unwarranted assumption—the result of mixing them with the 175,510 children now in the public schools of Oregon would be all but negligible.

But the whole notion is founded upon a misconception of the situation. The public school is not a "melting pot". Schools are, and obviously must be, located in given districts. If the neighborhood be American, the school there will have a similar character. If, however, it be situated in a poor and foreign quarter, the school will be attended almost entirely by children of the poorer

class of foreigners. That element is inherent in the nature of things, and the statute in suit cannot alter it.

Plain common sense must convince any thoughtful or reflecting person that the child of a foreigner is quite as likely to be assimilated and Americanized in a private or parochial school as in a public school. The course of study and methods of instruction are substantially the same in the private or parochial school although frequently superior. In both kinds of schools the child necessarily meets and comes into close contact with many thoroughly American teachers and scholars. Whatever assimilative influence the public schools exert, the private and parochial schools must needs exert in a like or even greater degree.

The official argument then declares that—

> "The permanency of this nation rests in the education of its youth in our public schools, where they will be correctly instructed in the history of our country and the aims of our government, and in those fundamental principles of freedom and democracy, reverence and righteousness, where all shall stand upon one common level."

But there was no claim in such official argument or in the court below that as a matter of fact and truth American history and the aims of our Governments were not being correctly taught in the private and parochial schools of the state, nor was there any suggestion that the children attending such schools were not being properly or adequately instructed in any fundamental principles of freedom and democracy or in reverence and righteousness. In view of the truth known or available

to every voter, any such claim would have been simply preposterous and readily refuted because well-known to be false.

The private and parochial schools teach the same subjects as the public schools—whatever one does to inculcate and foster patriotism, the other can and does do quite as well. Certainly they can be made to do so by proper regulation, and certainly it is unreasonable and unjust in the extreme to suggest obliquely and by innuendo that the religious schools of the state, Catholic, Episcopalian, Presbyterian, Methodist, Lutheran, etc., do not inculcate reverence and righteousness and are to be classed as "red" or grouped with "bolshevists, syndicalists and communists" as suggested at p. 46 of the brief on behalf of the Governor of Oregon! Nothing in this contention, therefore, called for or warranted destruction of these schools.

As a matter of fact, however, private and parochial schools in Oregon are, and long have been, subject to inspection by the State Superintendent of Public Instruction, and anything prejudicial to the public welfare could easily have been prevented by proper and reasonable supervisional regulation. They are practically required to teach "such branches as are usually taught in the first eight years in the public schools" (appendix I, p. 14). The standards and methods are the equivalent of those which obtain in the public schools. No intimation was made below that the Superintendent of Public Instruction had found that private and parochial schools were not being properly conducted. No such charge is contained even in the official argument in favor of the enactment, and nothing in the record even remotely suggests it, nor did

any of these appellants venture to make any such suggestion in the court below.

The final ground put forward in the official argument is that—

> "Our children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, there to absorb the narrow views of life as they are taught. If they are so divided, we will find our citizenship composed and made up of cliques, cults and factions each striving, not for the good of the whole, but for the supremacy of themselves. A divided school can no more succeed than a divided nation."

No legislation can proscribe social discrimination, and the statute in the case at bar is singularly inappropriate to that end. Young children do not discriminate against each other; that is a characteristic of maturity. The picking and choosing of friends for reasons based upon money, creed, or social status come, not during elementary school days, but afterwards; and no force thus far vouchsafed to man has ever been equal to the destruction or elimination of social distinctions. How the act in suit could accomplish that result, no one can tell; and, as a reason for annihilating the appellee's useful and honorable business, it amounts to nothing.

The foregoing are all the reasons assigned in the official argument in support of the act.

The briefs of the appellants, however, urge an additional ground, although there is nothing to show that that ground had even the slightest influence with the people of Oregon. It is now intimated that the statute was necessary in order to effectuate compulsory education. But the suggestion is clearly based upon false premises.

It assumes that parents, who contribute through their taxes to the public schools and, in addition, pay that private and parochial schools may educate their children, will not be as zealous to secure for their children at least as good an education as the public schools afford. Again, the argument assumes that private schools teaching for pay would continue to exist for any substantial period of time, if they proved themselves less efficient educationally than the free public schools with which they compete. And, finally, the argument overlooks the fact that regulation is ample to cure the alleged defect; and that it is even now, and for years has been, the duty of the school board to see to it that private schools maintain themselves on at least a parity with corresponding public schools. See section 5259, Oregon Laws, quoted appendix I, pp. 13-14.

The notion that private and public schools cannot exist in peace and harmony side by side, which underlies the act in suit, is not only contradicted by long experience, but is probably held by no competent educator. Experiment in education is practically only possible in private institutions; and, in the past, educational progress has been almost wholly the result of private school effort and initiative. Again, public activities are invariably forwarded by private competition; in that manner contrast which induces restraint and prevents arbitrariness, is at all times at hand. Recently the President of Swarthmore College declared that—

> "The prohibition of private elementary schools means that private enterprise is not to be allowed to do that extremely valuable experimentation that

public agencies rarely find it possible or advisable to attempt."

And Dr. Claxton, the former Commissioner of Education of the United States, has expressed himself as follows:

> "I believe in the public school system. It has been the salvation of our democracy, but the private schools and colleges have been the salvation of our public schools. These private institutions have their place in our educational system; they prevent it from becoming autocratic and arbitrary and encourage its growth along new lines."

Finally, the National Education Association at its latest annual convention, held in Washington in July, 1924, adopted the following resolution:

> "The National Education Association, while recognizing the American public school as the great nursery of broad and tolerant citizenship and of a democratic brotherhood, acknowledges also the contributions made to education by private institutions and enterprises, and recognizes that citizens have the right to educate their children in either public or private schools, when the educational standards of both are approved by the State educational authorities."

It is unnecessary to multiply citations to like effect; unaided reason and practical experience would readily lead us to the same conclusions.

3. Thus far we have considered the enactment in suit only in reference to the rights of the private and parochial schools and the teachers they employ. But there is involved in the case at bar a far more important group of individual rights, namely, the rights of the parents

and guardians who desire to send their children to such schools, and the rights of the children themselves. Reflection should soon convince the court that those rights —which the statute seriously abridges and impairs—are of the very essence of personal liberty and freedom.

Children are, in the end, what men and women live for. Through them parents realize, as it were, a measure of immortality. To the parent the child represents the sum of all his hopes. One's defeated aspirations, his children may achieve; his unfulfilled ambitions, they may realize. All that we missed, lost, failed of, our children may have, do, accomplish, in fullest measure. Thus, they hold in their new, young lives the dearest and most intimate yearnings of the parent's soul. For them parents struggle and amass property and put forth their greatest efforts and strive for an honored name. In return for the enormous sacrifice they make and burden they bear, parents have the right to guide and rear their children to be worthy of them. What right could be more truly and completely of the essence of liberty? *Tillman* v. *Tillman*, 26 L. R. A. (n. s.) 781, 785, *et seq.* (S. Car.). Manifestly so vital and intimate a right may not be invaded by the state without the clearest justification and imperative necessity therefor: "If a state takes hold of the child, the father is no longer free, and tomorrow not a trace of liberty will be left" (Jules Simon, L'Ecole, p. 345).

In this day and under our civilization, the child of man is his parent's child and not the state's. Gone would be the most potent reason for women to be chaste and men to be continent, if it were otherwise. It was entirely

logical for Plato, in his scheme for an "ideal commonwealth," to make women common; if their children were to be taken from them, and brought up away from them by the state for its own ends and purposes, personal morality was, after all, a secondary matter. The state-bred monster could then mean little to his parents; and such a creature could readily be turned to whatever use a tyrannical government might conceive to be in its own interest. In such a society, there would soon be neither personal nor social liberty. "Take away from the parents all care and concern for their children's education, and you make a social life an impossible and unintelligible notion" (Pufendorf's Law of Nature and Nations, book VI, ch. II, sec. 4). It need, therefore, not excite our wonder that to-day no country holds parenthood in so slight esteem as did Plato or the Spartans—except Soviet Russia. There children do belong to the state; as in Plato's "ideal commonwealth", "the pupils [are] regarded as belonging to the state rather than to their parents" (Plato's Laws, book VII), and personal and national freedom are there at their lowest ebb. In final analysis, it is submitted, the enactment in suit is in consonance only with the communistic and bolshevistic ideals now obtaining in Russia, and not with those of free government and American conceptions of liberty.

To us in the United States, living under the blessings of free institutions and of the Constitution which guarantees them, our children mean everything. What more natural, therefore, than that we should, as a vital part of our own and their liberty, be tenderly solicitous about

their education and keenly zealous of our right to guide and control it? What more natural, also, than that we should desire them to be taught our own faith, to cherish whatever religion we accept, to hold fast to the moral precepts taught with or in our own creed, and to learn these things from teachers of our own choosing? Such instruction is, of course, not to be found in the public schools. Nevertheless, to many millions, to a very great and constantly increasing proportion of our people, it will always seem indispensable that the education of their children should not be merely secular; that religious and moral training should not consist merely of a short lesson every Sunday, but should be taught day by day and every day and should accompany, and, indeed, underlie and influence all the ordinary teaching, and should be by those only who are competent to teach religion and whose lives are dedicated to God and His service. In such a system of training a parent may well see the means, and perhaps the only practical means, of saving his child from the crass materialism which more and more tends to possess the minds and hearts of men.

The daily press each week reports some wise and experienced judge of a criminal court as exhorting the public to educate their children in religion and to do so as the most effectual means whereby to assure the moral character and law-abidingness of their children and what the proponents of the present enactment called "reverence and righteousness." Only recently a revolting murder was perpetrated for sport and in cynical disregard of all that was right by two educated young sons belonging to respectable families, and the public prints through-

out the land proclaimed the fact that these young assassins, although amply educated otherwise by parents of large means, had had no religious or moral training worthy of the name.

Earnestly we submit that there is, indeed, great necessity in our land for such schools and such teaching as the appellee Society affords to its pupils. It is, therefore, both proper and reasonable that parents and guardians should deem it a part of their dearest rights and highest liberty that such schools should not be wantonly uprooted and destroyed.

It was doubtless considerations such as the foregoing which prompted Prof. Freund to declare in his learned work on the police power that (sec. 266)—

> "In one respect . . . education must be constitutionally free, namely in so far as it is essential to the freedom of religion; for the free exercise of religion implies teaching as well as worship. The state could certainly not prescribe the religious education of children, in so far as it would thereby establish a religion, or discriminate in favor of one; nor could it suppress all private schools, since religious denominations would thereby be prevented from inculcating their doctrines in the most effectual way."

The great French publicist Guizot pointed out that—

> "All rights in the matter of education do not belong to the state. There are rights which are—I do not want to say superior—but anterior to those of the state and co-exist with them. The first rights are the rights of families. Children belong to families before they belong to the state. The state has the right to furnish teaching, to supervise it, to direct it in its own establishments; it has not the basic right to impose its teaching

> arbitrarily and exclusively upon all families without their consent and contrary to their wishes" (quoted in Biétry, Proposition de loi sur la séparation des écoles et de l'état; session de 1910, p. 63).*

President Butler of Columbia University has stated a similar doctrine, in declaring that—

> "In our American theory, the state steps in, not to monopolize education or attempt to cast all children in a common mold, or forcibly to deprive them of all religious training and instruction, but merely to prevent damage to itself. It offers a free opportunity to every child to receive elementary education, and usually much more than that, in tax-supported schools. But it is in no sense the business of the state, in our American political philosophy, to attempt to monopolize education or to prevent the freest choice by parents of the teachers and schools of their children."

That, we submit, is the sound and true doctrine. It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent. In *Meyer* v. *Nebraska,* 262 U. S. 390, 399-400, this court, upon full citation of authority, declared that—

> "While this court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment to the Constitution], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the

---

* See also Taparelli, Natural Law, vol. II, pp. 494, 510; Fustel de Coulanges, The Ancient City, 7th ed., p. 293 *et seq.;* Kent's Commentaries,* p. 195.

common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

In *Taylor and Marshall* v. *Beckham* (*No. 1*), 178 U. S. 548, 602-3, Mr. Justice Harlan said:

"The liberty of which the Fourteenth Amendment forbids a State from depriving any one without due process of law is something more than freedom from the enslavement of the body or from physical restraint. In my judgment the words 'life, liberty or property' in the Fourteenth Amendment should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of 'due process of law.'

"In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, this court unanimously held that the liberty mentioned in the Fourteenth Amendment 'means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.'

"Judge Cooley, speaking for the Supreme Court of Michigan in *People* v. *Hurlburt*, 24 Mich. 44, after observing that some things were too plain to be written, said: 'Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; it consists in the civil and political rights which are absolutely

> guaranteed, assured and guarded; in one's liberties as a man and a citizen—his right to vote, his right to hold office, his right to worship God according to the dictates of his conscience, his equality with all others who are his fellow citizens; all these guarded and protected and not held at the mercy and discretion of any one man or any popular majority. Story, Miscellaneous Writings, 620. If these are not now the absolute rights of the people of Michigan, they may be allowed more liberty of action and more privileges, but they are little nearer to constitutional freedom than Europe was when an imperial city sent out consuls to govern it.' "

See also *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 534; *Coppage* v. *Kansas,* 236 U. S. 1, 10, 14; *Smith* v. *Texas,* 233 U. S. 630, 636; *People* v. *Gillson,* 109 N. Y. 389, 398-9; *Tillman* v. *Tillman,* 26 L. R. A. (n. s.) 781, 785 *et seq.* (S. Car.).

A reading of the authorities which have heretofore considered the meaning of the constitutional guaranty of "liberty" should, it is submitted, persuade the mind beyond doubt that the parental right herein in issue is of the very essence of the constitutional guaranty embodied in the Fourteenth Article of Amendment to the Constitution of the United States. Compared with it, the right to engage in a business, to teach, to acquire knowledge, to contract, etc., which have had explicit recognition by this court as embraced within the "liberty" contemplated in the Amendment, verily shrink into relative inconsequence.

The statute in suit trespasses, not only upon the liberty of the parents individually, but upon their liberty collectively as well. It forbids them, as a body, to sup-

port private and parochial schools and thus give to their children such education and religious training as the parents may see fit, subject to the valid regulations of the state. In that respect the enactment violates the public policy of the State of Oregon and the liberty which parents have heretofore enjoyed in that state. The highest court of that state declared in *Liggett* v. *Ladd,* 17 Ore. 89, 94, that—

> "The right of mankind to believe and teach such doctrines regarding religion as meet the approval of their consciences is recognized under our form of government as inherent; it is freely accorded to every sect and denomination in the land, and is so interwoven with the principles which underlie our political fabric that it cannot be taken away without the general consent or a violent revolution. The law not only tolerates the privilege, but protects every one in the enjoyment of it. The people are entitled, as an incident of such right, to form associations, adopt creeds, organize churches, and establish seminaries of learning for the advancement of their peculiar tenets of faith, and to acquire property and erect buildings to aid them in accomplishing that end."

The sound common sense which should control in the matters herein in controversy, as well as the true and patriotic rule of constitutional law upon the subject, was tersely and aptly expressed by a former distinguished Vice-President of the United States, Thomas R. Marshall, as follows:

> "I have an old-fashioned notion that in a government where freedom of religion is guaranteed to the citizen, as a father of a child, I have a right to train it along the lines of my own religious belief.

> "I doubt that any officer, however gifted and high-minded he may be, can have a tenderer regard for my child than I myself possess, that he can more sincerely desire his health, happiness and success.
>
> "Unless I develop into such a brute as to be unfit to take care of my child and thus warrant society in removing him permanently from my custody, I should be let alone to look after his health, care for his wants, guide his education and instil into his mind such religious views as I think will enable him to stand against the temptations of a tempestuous world."

See also *Milwaukee Industrial School* v. *Superiors,* 40 Wis. 328, 332; *People* v. *Turner,* 55 Ill. 280; *State ex rel. Sheibley* v. *School District,* 31 Neb. 552, 556; *Trustees* v. *People,* 87 Ill. 303.

4. In whatever light the act in suit be regarded, it must be manifest that, in the end, it embodies the pernicious policy of state monopoly of education. Except in Soviet Russia, there has been none in modern times so poor as to do that discarded doctrine of tyrants any reverence. Courts, publicists, philosophers, pedagogues —all alike have repudiated it. The standardization of education despite the diversity of character, aptitude, inclination and physical capacity of children, which state monopolization of the training and teaching of the young renders inevitable, has found well-nigh universal condemnation. The young minds of the Nation should not be cast in any such straight-jacket and their diversification and individual development dwarfed and prevented. Again, the excess of power which results to the state from such a device, clearly serves to maintain and pre-

serve despotism and checks the normal evolution of liberty. Finally, the removal of competition with private effort offers unlimited opportunity for arbitrariness, and likewise checks experiment, innovation and progress.

The Belgian savant and statesman, Van Humbeeck, uttered this pregnant thought:

> "There never was a tyrannical government—whether the tyranny was exercised by one individual or by the masses—which did not claim the right to educate the rising generations, to form the character of the Nation; and, upon the other hand, there never was a free country in which public opinion did not uphold those who claimed that the individual ideas of the citizens must prevail in matters of education."

A century ago Chancellor Kent wrote in his commentaries upon the common law (*p. 195) that—

> "Several of the states of antiquity were too solicitous to form their youth for the various duties of civil life, even to entrust their education solely to the parent; but this, as in Crete and Sparta, was upon the principle, totally inadmissible in the modern civilized world, of the absorption of the individual in the body politic and of his entire subjection to the despotism of the state."

Chancellor Kent's views were accepted by the courts in *Milwaukee Industrial School* v. *Superiors,* 40 Wis. 328, 332, and *People* v. *Turner,* 55 Ill. 280; and, until the Russian Soviet system came into being in Russia, determined to destroy personal liberty, parental control and religion, and until the statute in suit was enacted in Oregon, for pernicious and intolerant purposes perhaps better left undiscussed in this court, it was doubtless true in modern times that the principle of the total absorption

of the individual in the body politic and his entire subjection to the state, was everywhere in Chancellor Kent's apt words "totally inadmissible."

In his work on liberty, John Stuart Mill included a chapter on the state and education (ch. V, p. 205). Therein he wrote—

> "That the whole or any large part of the education of the people should be in State hands, I go as far as any one in deprecating. All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education. A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body."

In a learned article on education contained in the Encyclopedia Britannica the following will be found (11th ed., p. 960):

> "It is recognized as the duty of the state to insist upon a certain minimum of education for every future citizen. This does not necessitate a monopoly of education on the part of the state, such as was claimed by the Napoleonic despotism under the traditional influence (it would seem) of the old authoritative Gallo-Roman tradition, transformed in its outward manifestation but not in its inward spirit by the French Revolution. Such a monopoly would be plainly repugnant to the spirit of Anglo-Saxon individualism, and it is interest-

> ing to note that attempts to reassert it have in recent times been repudiated in republican France by some of the best exponents of modern thought, as an infringement of personal liberty not calculated to justify itself by any corresponding public gain."

Similar pronouncements have been made by Herbert Spencer (Principles of Sociology, vol. I, sec 321, vol. III, sec. 849), Cardinal Mercier (Ethics, p. 278), Adolphe Thiers (Biétry, Proposition de loi sur la séparation des écoles et de l'état, Session de 1910, p. 63), and a host of others.

It will, therefore, be readily appreciated why President Butler of Columbia University in a recent address on education, was moved to exclaim, in reference to the statute in suit—

> "Fancy, if you can, what the future historian will say of the people of the State of Oregon, who, one hundred and thirty-five years after the adoption of the Constitution of the United States with its Bill of Rights, enact by popular vote a statute which makes elementary education a government monopoly. If Samuel Adams and Benjamin Franklin and Patrick Henry and Thomas Jefferson turn in their graves on learning this news, there need be no surprise."

5. A suggestion made in the argument of the appellants should be briefly noticed, although it is difficult t. believe that it is seriously urged. It is said that the statute does not really suppress the private and parochial schools, because the parent may still send his child to them after the child has attended a whole school day at the public school.

In *Meyer* v. *Nebraska*, 262 U. S. 390, 398, the following was quoted from the court below:

> "The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small."

No more need be said. The appellants' argument is plainly unsound and founded upon an impractical notion which no one can accept as a basis for sensible action.

IV.

THE LEGISLATIVE POWER OF A STATE IN RELATION TO EDUCATION DOES NOT INVOLVE THE POWER TO PROHIBIT OR SUPPRESS PRIVATE SCHOOLS AND COLLEGES.

The power and duty of the state to furnish schools for the children whom it commands shall be educated and who otherwise would have no means of education or compliance with the law is, of course, indisputable, and likewise the difficulty, if not impracticability, of teaching religion in the public schools to those children whose parents or guardians desire that they be given adequate religious instruction. Much of the argument of the appellant Governor of Oregon, with its reference to "the rising tide of religious suspicions" and its emphasis upon "the separation of children along religious lines" (brief, p. 40) must mean logically, if pertinent at all to the present discussion, that children should either not be taught religion at all or should be trained in only one religion

prescribed by the state and dictated from time to time by a majority of "the voters of Oregon" as they might determine, and thereby overthrow the sound and beneficent American doctrine of the separation of Church and State. We would then have a recrudescence of the most odious and objectionable of all the tyrannies of the seventeenth and eighteenth centuries: the state compulsorily and oppressively regulating or attempting to regulate the religious beliefs of children.

The familiar statement that education is a public function means no more than that it is a function that the state may undertake, because it vitally interests and concerns the state that children shall be furnished the means of education and not left to grow up in ignorance. But the power of the state to provide public schools carries with it no power to prohibit and suppress private schools and colleges which are competent and qualified to afford what the state wants, namely, education.

Thus, there is no question as to the power of the state to construct and operate public roads, bridges and other means of transportation; yet it would hardly be seriously contended that the state might under the police power forbid the further operation of all private highways, bridges and railroads. Whenever the state desires the use of any such existing facilities for some distinctly public purpose, it can take them only by the exercise of the power of eminent domain. *Los Angeles* v. *Los Angeles Gas & Electric Corporation*, 251 U. S. 32, 38.

Again, a state may undertake the functions of buying and building and selling or leasing homes and of

constructing and operating warehouses, elevators and flour mills (*e. g., Green* v. *Frazier,* 253 U. S. 233); but it would not follow therefrom that the state might prohibit all private enterprise in building, selling, or leasing homes, or by a prohibition render valueless the investment of private capital in warehouses, elevators and flour mills.

The conduct of employment agencies, to cite another example, is clearly of sufficient general and public interest to warrant the state in conducting public employment agencies, but this does not carry with it the power to forbid and suppress private employment agencies. *Adams* v. *Tanner, supra,* 244 U. S. 590. The minority who dissented in this case had no thought that the fact that the enterprise was one into which the state might enter, tended in any way to the conclusion that it was one which the state might monopolize and forbid to private persons. They differed from the majority only as to the degree of the conceded evils arising in connection with private employment agencies and the inadequacy of regulation or of public agencies to counteract these evils (see language of Mr. Justice Brandeis, dissenting, at pp. 597-616).

The present case is wholly outside the principle that where a state may enter upon an undertaking which can be conducted profitably and satisfactorily only as a monopoly, it may prevent competition or the continued use of competing facilities by condemning and destroying property under the power of eminent domain and just compensation. The Oregon enactment is not an exercise of the power of eminent domain. More important still

is the fact that the public school system is in its essence an enterprise not conducted for profit. Hence, the state can suffer no conceivable harm from the co-existence of a private-school system. Private schools in no way interfere with the full freedom of conducting public schools in any way that the state may see fit.

Private education, instead of in any way constituting a menace to education as conducted by the state, has long been a great and valuable aid to the public system. Private schools admit of experimental methods and testing of results much more readily than do public schools. The regimentation and centralized control characteristic of a public school system render it difficult to deal with particular groups in accordance with their special and peculiar needs. Selection and classification of such groups for special treatment, tentative adjustment of methods of instruction, and tentative selection of novel subject matter are much more feasible where parents or guardians have an option as to the particular school or group to which their children shall be assigned. It is almost universally conceded by educational experts that the improved methods of child education which have been first worked out and tested in private schools have been of incalculable benefit to the public schools. More and more the education of children is becoming a science whose principles are slowly being evolved by continuous experimentation and testing of results by trained experts. The law of Oregon puts it beyond the power of individuals to continue independently this process of scientific inquiry. It deprives public education of the benefits to be derived from the manifold and varied investigations

and experiences of teachers unfettered by official superiors and bureaucracy in their efforts to discover the most desirable modes of teaching the youth of our country.

In its essence, the Oregon law is one strangling scientific investigation in private laboratories. Such a strangling, instead of being an aid to public education (as restraint of private lighting and private transportation might be conceived to be an aid to public lighting and public transportation) is a serious loss to public education. In this aspect of the case, the Oregon law is no more within the constitutional power of a state over public education than would be a law forbidding private investigation into the cause and cure of disease, because the state could, as a proper public purpose, undertake similar investigations by public agencies. Such a law would prevent "the making of social experiments that an important part of the community desires",* and deprive the public as a whole of the benefits to be derived from those experiments. It would be denying that "ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."**

The social interests menaced by the suppression of private educational institutions and the denial of lib-

---

* Mr. Justice Holmes, dissenting in *Truax* v. *Corrigan*, 257 U. S., at p. 344.

** Mr. Justice Holmes, dissenting in *Abrams* v. *United States*, 250 U. S., at p. 630.

erty to pursue long rooted habits and traditions among our people are peculiarly of the character that the Fourteenth Amendment was most immediately designed to protect from state political action. Private and religious schools and colleges existed in this country long before the Revolution and were indeed then almost the only educational institutions. As Mr. Justice Holmes said in *Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 358, 366: "Tradition and the habits of the community count for more than logic."

The Fourteenth Amendment had for its primary object the prevention of state legislation calculated to keep one class in subjection to another in respect of opportunities for economic and social advancement, the pursuit of happiness, and the exercise of fundamental rights comprehended in an essential individual liberty—among men fit for freedom. Such was the interest conserved by *Buchanan* v. *Warley,* 245 U. S. 60, which, by declaring unconstitutional a restraint on freedom of property owners to sell land for occupancy by persons of designated colors, insured to the colored race the right to reside where they might through free bargaining secure the opportunity. Similarly *Meyer* v. *Nebraska,* 262 U. S. 390, and *Bartels* v. *Iowa,* 262 U. S. 404, by declaring unconstitutional statutes forbidding the teaching of subjects in foreign languages to children in the elementary grades in private schools, secured to parents the opportunity to place their children where they might study subjects in other languages than English. As to the declared aim and alleged justification for these latter statutes that they tended to promote what is called

Americanization, the answer was that the means used went beyond what was necessary or legitimate and even then gave no assurance of the result. We have already seen that the state may require instruction in private schools in the subject matters essential to a proper understanding of the institutions of the country and that the Oregon legislature has so enacted (appendix I, pp. 16, 18). But it does not follow that it can take substantially the whole available school time of the children to accomplish this particular purpose. It was obvious that teaching in English was a useful means toward the end of Americanization. Yet the court held that this legitimate purpose did not justify complete prohibition of the teaching of subjects in other languages than English. Surely, if the state cannot forbid the teaching of a single subject in a specified way or enforce such a limited restraint upon individual liberty to teach, *a fortiori* it cannot forbid the teaching of all subjects in any way whatsoever!

In the present case, as in those cited, there is the same interference with the freedom of property owners and of parents, and there is at stake the same social interest of freedom from state compulsion and bureaucracy in respect of the opportunities for self-advancement and self-development and the inalienable right to liberty.

This becomes more readily manifest by taking into account the untrammeled power of the state in the conduct of its public business and public institutions. *Waugh* v. *Mississippi University*, 237 U. S. 589; *Heim* v. *McCall*, 239 U. S. 175; *Crane* v. *New York*, 239 U. S. 195. These decisions make it clear that the state, as the proprietor

and conductor of educational institutions, is free from the restraints of the Fourteenth Amendment. The principle is firmly established that the judiciary cannot supervise the discriminations incident to the administration of a public service rendered by the Government or discriminations in the choice of public employees.

It is clear, therefore, that the state in conducting public schools has a free hand in its own institutions in prescribing the curriculum, in selecting the teachers, in grading the pupils, and in apportioning the public funds. There could be no judicial relief if the state limited the subjects to be taught. No court could in practice serve successfully as an appellate board of education or superintendent of schools even if it recognized a constitutional power to do so. Thus, Oregon by its present statute assumes an arbitrary power to discriminate as it pleases in deciding what children shall be taught, what shall be taught to children, and by whom it shall be taught. If Oregon may do this, so may every other state in the Union. There are no peculiar conditions in Oregon to be adduced in support of this statute, corresponding to the peculiar conditions adverted to by Mr. Justice Holmes in his dissent in *Bartels* v. *Iowa*. If this court now sustains the suppression of private educational institutions for the elementary grades in Oregon, it sanctions a power to suppress the teaching of subjects in any language but English, and to preclude large groups of citizens from exercising that reasonable freedom of choice as to the type of education desired for their children, and thereby to accomplish by a suppression of private schools what could not constitutionally be re-

quired as a regulation thereof. If this may be done for the elementary grades, it is hard to see why it cannot be done for high-school and collegiate education in every state of the Union.

Should such a statute as is now before the court be held to be constitutional, any dominant political group could monopolize all education, could destroy large values invested in private educational institutions, could arbitrarily exclude large classes of the population from the pursuit of their chosen vocations, could impose curricula which make for the stratification or leveling of the population, and could to a very large degree in practical effect control private opinion on religious and social issues. As an instrument for promoting the subservience of one group in the population to another, this statute has had no parallel in the history of American legislation and nowhere else except in Soviet Russia. It is not, like some statutes that have been sustained, an instrument for enlarging the freedom of one class by restricting the freedom of another. Oregon is not choosing between two competing liberties which cannot co-exist. The liberty of parents to send their children to private schools in no way interferes with the liberty of other parents to send their children to public schools. The liberty of teachers to teach in private schools in no way interferes with the liberty of other teachers to teach in public schools. By this statute, in a word, there is a net loss to the liberty of the individual guaranteed and protected by the Fourteenth Amendment which equals the gross loss caused by its immediate incidence, for no conceivably equivalent benefit can reasonably result.

V.

THE STATUTE IMPAIRS THE OBLIGATION OF THE CONTRACT EMBODIED IN THE APPELLEE'S CORPORATE CHARTER.

The *Dartmouth College case,* 4 Wheat. 518, conclusively settled the rule of law that the corporate charter of an educational institution may be a contract within the meaning and protection of section 10 of Article I of the Constitution of the United States forbidding the states to pass any law impairing the obligation of contracts. Turning to the charter of the plaintiff-appellee (pp. 14-6), it will be seen that it was incorporated expressly to educate and instruct youth and to establish and maintain schools (art. II) and to do so for profit (art. III). Quite plainly the statute in suit materially interferes with the rights granted to the plaintiff in and by this charter.

The corporation laws under which the appellee exists as a corporation (Deady's Code, 1886, pp. 632-4, as amended by General Laws of Oregon for 1903, pp. 176-7) do not contain any provision empowering the state to alter, amend, or repeal the charter; and the constitutional provision which was in force in Oregon when the appellee was organized (sec. 2, Art. XI), while permitting the corporation laws of the state to be altered, amended, or repealed, nevertheless, expressly limited that power by providing that it was not to be exercised "so as to impair or destroy any vested corporate rights".

The highest court of the State of Oregon has authoritatively construed this constitutional provision. *Liggett* v. *Ladd*, 17 Ore. 89; *Lornsten* v. *Union Fishermen's Co.*, 71 Ore. 540. In the cases cited it was held that a corporation had a vested right to its corporate name which subsequent legislation of the state could not impair. If that be so, *a fortiori* the right granted to the plaintiff-appellee upon its incorporation to maintain and conduct schools for pay, is likewise a vested right within the meaning of the Oregon constitutional provision above referred to; and, as such, may not be impaired or destroyed by the legislature. The enactment in suit is, consequently, void, not only because of this provision of the Oregon constitution, but also because it impairs the obligation of a contract in violation of section 10 of Article I of the Constitution of the United States.

The case of *Berea College* v. *Kentucky*, 211 U. S. 45, is plainly distinguishable from the case at bar. There the charter of the corporation had been granted under a statute containing a reservation to the state of power to amend, alter, or repeal the corporation laws without any limitation whatever. This reservation of power conferred upon the legislature of Kentucky a free hand. But in the present case, as has been seen, the Oregon constitution and corporation laws did not confer on the Oregon legislature any such plenary power. Where "vested corporate rights" would be impaired or destroyed, the Oregon legislature was left with no amendatory power at all; and when, therefore, the voters by initiative petition attempted to exercise such a power in and by the enactment now before this court, they violated both the state and the federal Constitution.

The foregoing considerations make peculiarly pertinent the following passage from the dissenting opinion of Mr. Justice Harlan in the *Berea College case,* 211 U. S. at p. 67:

> "The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by Government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Adair* v. *United States,* 208 U. S. 161, 173."

Conclusion.

The ruling of the court below granting the preliminary injunction on the ground that the Oregon Compulsory Public School Law, adopted under Initiative Petition November 7, 1922, was unconstitutional in that it violated the guaranties contained in the Fourteenth Article of Amendment to the Constitution of the United States, was correct, and the order appealed from should, therefore, be affirmed.

New York, February, 1925.

William D. Guthrie,
Bernard Hershkopf,
Of counsel for appellee.